Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-975

GOVERNMENT OF INDIA, *Petitioner,*

v.

PFIZER, INC., AMERICAN CYANAMID COMPANY, BRISTOL-MYERS COMPANY, SQUIBB CORPORATION, OLIN CORPORATION, AND THE UPJOHN COMPANY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner, the Government of India, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eigth Circuit entered in this proceeding on August 27, 1975.

REPORTS OF OPINIONS BELOW

The opinion of the Court of Appeals is reported at 522 F.2d 612 and appears as Appendix "A" hereto (App. 1a). The Order of the District Court dated October 23, 1974, by Judge Miles W. Lord, sitting

by special designation, is unreported and appears as Appendix "B" hereto (App. 18a). That Order is based upon and adopts an earlier Order and opinion dealing with the same question in a related case, and the adopted Order and opinion appears as Appendix "C" hereto (App. 19a).

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on August 27, 1975. On November 14, 1975, petitioner secured an extension of time in which to file this petition until January 9, 1976, by an Order of the Court signed by Mr. Justice Blackmun (App. 23a). This petition for certiorari was filed within that time period. The Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

(1) Whether the Government of India has standing to assert as official representative the antitrust damage claims of its nationals resident in India, where (i) the Government of India has a "pecuniary interest" in the litigation derived from its ownership and conservatorship of all foreign exchange in India, including foreign exchange used to accomplish the original purchases from defendants in the foreign commerce of the United States; (ii) under its laws and Constitution and by virtue of its political and social relations to its citizenry, the Government of India has "an obligation to the general public" which requires it to pursue the rights of its citizens, including those at stake herein, and (iii) alternative class action remedies are as a practical matter unavailable and as a political matter unacceptable?

(2) Whether a foreign sovereign has standing under Section 4 of the Clayton Act to assert as *parens patriae* the damage claims of its resident nationals aggrieved by conduct of defendants in conflict with the antitrust laws and affecting the foreign commerce of the United States?

PROCEDURAL HISTORY

The Government of India filed its complaint on October 15, 1974, alleging violations by defendants of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1 and 2, and Section 7 of the Clayton Act, 15 U.S.C. §18, as well as fraud and deceit by defendants, in connection with sales of broad-spectrum antibiotic products to purchasers in India.[1] The complaint

[1] Upon filing, this case joined the more than 150 actions brought against defendants in the Southern District of New York or transferred there by the Judicial Panel on Multidistrict Litigation for coordinated or consolidated pretrial proceedings. See, *In re Antibiotic Drugs*, 295 F.Supp. 1402 (J.P.M.L. 1968); 297 F.Supp. 1126 (1968); 299 F.Supp. 1403 (1969); 301 F.Supp. 1158 (1969); 303 F.Supp. 1056 (1969); 309 F.Supp. 155 (1970). The settlement of 66 of these actions, primarily by plaintiff states and municipalities, as special class actions, was approved in *State of West Virginia* v. *Chas. Pfizer & Co.*, 440 F.2d 1079 (C.A. 2 1971), *cert. denied* 404 U.S. 871 (1971). Settlement was also reached in an additional group of cases involving the claims of private hospitals and blue cross plans. *Hartford Hospital* v. *Chas. Pfizer & Co.*, 52 F.R.D. 131 (S.D.N.Y. 1971). The remaining "nonsettling" cases were assigned to Judge Miles W. Lord for completion of pretrial proceedings. See, *In Re Antibiotic Drugs*, 320 F.Supp. 586 (J.P.M.L. 1970). The United States, suing for single damages under 15 U.S.C. 15a, and certain other domestic plaintiffs have since November 1974 been engaged in trial before Judge Lord on issues concerning defendants' liability. The foreign cases have been separately grouped and are still in pre-trial. The appeals on standing issues have not otherwise delayed proceedings before Judge Lord.

The civil litigations follow protracted criminal and F.T.C. proceedings which preoccupied the courts for many years. See, *inter*

alleges that as a result of concerted actions taken by defendants in violation of the antitrust laws, Indian purchasers (including hospitals, retailers, public institutions, and consumers) substantially overpaid and were injured thereby on purchases of drugs manufactured and sold by defendants. The complaint further alleges that the Government of India used foreign exchange resources (U.S. dollars) that it owned to cover the cost of *all* drug items covered by the Complaint and imported from the United States into India. Thus, a consequence of the antitrust violations was that the Government of India spent more of its precious foreign exchange on drug imports that it would have without those violations.

The complaint was brought by India in several capacities: for proprietary purchases of drug items by governmental entities (complaint, pars. 5-6, App. 25a); as representative of various classes of Indian purchasers and consumers (hospitals, importers, retailers, wholesalers, and individual consumers) (pars. 7-9, App. 25a); as *parens patriae* "for direct out-of-pocket damages suffered by political subdivisions, individuals, hospitals, clinics, retailers, wholesalers, and importers in India" (par. 10, App. 26a); and as

alia, Chas. Pfizer & Co. v. *F.T.C.*, 401 F.2d 574 (C.A. 6, 1968), *cert. denied*, 394 U.S. 920 (1969) (violation of § 5 of the F.T.C. Act); *United States* v. *Chas Pfizer & Co.*, 281 F.Supp. 837 (S.D. N.Y. 1968) (denying motion for acquittal, NOV, of violation of Sherman Act); 426 F.2d 32 (C.A. 2 1970) (reversing conviction), *modified*, 437 F.2d 957 (C.A. 2 1970), *aff'd by equally divided court*, 404 U.S. 548, (1972) (three justices not participating); 367 F.Supp. 91 (S.D.N.Y. 1972) (indictment dismissed).

While the F.T.C. and criminal cases were underway (and for one year thereafter) the statute of limitations was tolled under 15 U.S.C. 16(b). The period for filing new civil claims expired on December 1, 1974.

the "official representative of citizens, businesses, institutions and organizations in India, for direct out-of-pocket damages suffered by such citizens, businesses, institutions and organizations due to purchases of "B[road] S[pectrum] A[ntibiotics]" (par. 11, App. 26a).

Petitioner's complaint joined earlier complaints by Kuwait, Vietnam, Iran and the Philippines. Petitioners' complaint was followed by similar complaints by the Federal Republic of Germany, 4-74 Civ. 614 (D.Minn.); Spain, C.A. No. 74-1746 (D.D.C.); Colombia, C.A. No. 74-1747 (D.D.C.); and Korea, C.A. No. 74-1748 (D.D.C.).[2] All but two of the foreign sovereign complaints alleged *parens patriae* and official representative standing.

On November 19, 1975, four days after the filing of the complaint, defendants moved to dismiss, arguing that petitioner is not a "person" within the meaning of Section 4 of the Clayton Act, 15 U.S.C. § 15, and separately challenging the standing of petitioner to maintain suit in a *parens patriae* or official representative capacity.

Judge Lord denied both motions, basing denial on the "person" issue upon his decision and opinion concerning Kuwait and Vietnam *In Re Antibiotic Antitrust Actions; State of Kuwait* v. *Chas. Pfizer & Co., et al*, 333 F.Supp. 315 (S.D.N.Y. 1971). He denied the motion to dismiss the *parens patriae* and official representative allegations on October 23, 1974, in Miscellaneous Order 74-40 (App. 18a), based upon an earlier Miscellaneous Order No. 74-37, issued on

[2] The Governments of Kuwait and Spain have since withdrawn their complaints; Kuwait without prejudice to refile.

June 17, 1974, with respect to Iran and Vietnam (App. 19a). In the same Order 74-40, Judge Lord certified the *parens patriae*/official representative issue for interlocutory appeal pursuant to 28 U.S.C. § 1292 (b), just as he had earlier certified the same issue on September 5, 1974, in Miscellaneous Order No. 74-38 in cases involving Iran and Vietnam.

The Eighth Circuit granted permission to take the interlocutory appeals and consolidated all *parens patriae*/official representative cases under two docket numbers, 74-1847 and 74-1870. It also consolidated those appeals with a mandamus petition brought by defendants against Judge Lord after he had refused defendants' request to certify the "person" issue for intermediate appeal in cases involving the Philippines, Iran and Vietnam.

OPINIONS BELOW

In allowing a foreign sovereign to maintain suit as *parens patriae*/official representative, Judge Lord rejected arguments, based upon cases involving domestic States, that suit in such capacity (i) constituted a "taking" by the sovereign of the damage claims of its resident nationals without due process;[3] (ii) conflicted with a public policy preference (having due process underpinnings) in favor of class actions under Rule 23 of the Federal Rules of Civil Pro-

[3] *In re Multidistrict Vehicle Air Pollution Control Equipment*, 481 F.2d 122 (C.A. 9), *cert. denied*, 414 U.S. 1045 (1973); *California* v. *Frito-Lay, Inc.*, 474 F.2d 774 (C.A. 9), *cert. denied*, 412 U.S. 908 (1973); *Philadelphia Housing Authority* v *American Radiator & Standard Sanitary Corp.*, 309 F.Supp. 1057 (E.D. Pa. 1969), *aff'd*, 438 F.2d 1187 (C.A. 3 1970).

cedure;[4] and (iii) subjected defendants to the possibility of double liability. In Judge Lord's view, the State cases do not set out rules applicable to the relationship between a foreign government and its resident nationals, nor do due process considerations apply to that relationship. On practical grounds no risk exists of double recovery in these cases as between the sovereign and its nationals; as a legal bar, a recovery by the sovereign can be given *res judicata* effect.

On appeal, the Eighth Circuit reversed on the strength of the domestic State cases. It stated that "[p]rinciples of comity, international law and existing United States treaties do not afford foreign sovereigns the right to press their citizens' claims in a manner barred to domestic States vis-a-vis their citizens" (App. 13a). The Eighth Circuit mandated compliance with the exacting requirements of notice under Rule 23, even if thereby "the claims are rendered practically unenforceable" (App. 16a).[5]

[4] *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 266 (1972).

[5] The class representative in a class action must turn over all sums recovered to the class members represented and may retain no portion of the recovery, beyond his own damages, as a reward for his services to the class. Any residue which cannot be so routed to class members remains with or must be returned to the defendant.

By contrast, the official representative approach as envisioned by the Government of India (and presumably by the other foreign sovereign plaintiffs who claim similar official representative status) calls for the sovereign to route any recovery sum to aggrieved resident nationals, using procedures available to it, as sovereign, within its own country. After a full, good-faith distribution effort has been made to accomplish the routing of such funds, the sovereign uses any residue, on an earmarked basis, for public welfare expenditures related to purposes associated with the original transactions. This is the concept of official representative described by

BACKGROUND STATEMENT

At the outset, it should be stressed that India is acting here, pursuant to Indian law, as the official representative of its citizens. For the reasons stated more fully below, India believes that principles of comity, international law and existing United States treaties require that American courts recognize its representative status.

Official representative status arises in this case out of several responsibilities that the Government of India carries out for the benefit of all its citizens.[6]

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counsel to the District Court in argument on defendant's motion to dismiss the *parens patriae* and official representative allegations in the complaint. Joint Appendix, Ct. of App., pp. 58-59a.

This use of recovered funds exceeds requirements which attend the disposition of funds in a *parens patriae* form of action; for in a true *parens patriae* situation, the sovereign retains all recovery funds for use for public purposes as it deems fit, without any undertaking or obligation to route portions of the recovery to aggrieved individuals in the proportion of their injury. *In re Antibiotic Antitrust Actions, supra,* 333 F. Supp. 278, 288.

A second distinction between official representative and class action concerns adherence to Rule 23 requirements. In the official representative action, the foreign state undertakes to follow its own rules and procedures in dealing fairly with its nationals. But the foreign state does not allow individuals or groups of its nationals to challenge its fitness to serve as their representative in the maintenance or in the conduct of the litigation. Its nationals are however free to take such legal steps in the courts of the foreign state as may be appropriate under the laws of that country to seek whatever relief from *their* government which the circumstances and their own views of the matter suggest.

[6] By contrast with *parens patriae,* "official representative" emphasizes a cluster of related concepts outside the common law by which a foreign government relates to its citizens under its constitution and laws and acts to protect and represent their interests

First, in countries such as India, where strict foreign exchange controls obtain, the sovereign is required to make scarce foreign exchange available by weighing the competing needs of importation of commodities, of industrial development, and of other economic and social objectives.[7] To the extent that these allocations have been distorted by purchases of overpriced drugs, a responsibility of India towards all its citizens requires that a remedy be pursued. Second, the Government of India is charged by its laws and constitution to provide health care to its citizens, including the supply of drugs in the most efficient manner possible. In carrying out this responsibility, India must allocate its available resources among the competing needs of hospitals, clinics, research agencies, and patients. Since these decisions can only be intelligently based upon present needs as opposed to a pattern of past purchases, the Government of India is required to oversee the distribution of any recovery for the violations alleged in the complaint.

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before various tribunals, both domestic and foreign. Instances in which standing in this capacity has been recognized appear in the civil law, as recognized in *The Maret,* 145 F.2d 431, 437 (C.A. 3 1944), (standing accorded to the Latvian consul to protect interests of absent foreign nationals under civil law doctrine of *negotiorum gestor*), and in the Vienna Convention on Consular Relations, 21 U.S.T. 78, T.I.A.S. 6820 (paragraphs 5(a), (e), (i) and (m) allow a consul to represent the interests of absent nationals of the sending state "before the tribunals and other authorities of the receiving state" to preserve the rights of those nationals unable to assume a defense of their interests).

[7] Such foreign exchange controls have long been commonplace and are widely used today by foreign governments. See, *French* v. *Banco Nacional de Cuba,* 23 N.Y.2d 46, 242 N.E.2d 704, 715 (Ct. App. 1968); Annual Yearbooks on *Exchange Restrictions,* published by the International Monetary Fund, New York, N.Y. in which the exchange restrictions of each country, maintained in a manner consistent with the Articles of the Fund, are described.

These responsibilities of India to Indians are wholly different from those of one of the States of the United States to its citizens.[7a] India must act as total sovereign, taking into account special needs of a developing country and forming policies consistent with the form of government its citizens have chosen. Our States bear none of these responsibilities, and, therefore, analogies between the States and foreign sovereigns are bound to fail.

India has also brought suit as *parens patriae,* recognizing that this common law concept, peculiar to the United States and Great Britain, might provide it with standing in this litigation.[8] However, *parens*

[7a] *C.f., Sanitary District of Chicago* v. *United States,* 266 U.S. 405, 426 (1925); *New Hampshire* v. *Louisiana,* 108 U.S. 76, 90 (1882).

[8] But *parens patriae* jurisdiction has had limited application in practice. *California* v. *Frito-Lay, Inc., supra,* 474 F.2d 774, 776; *Johnson* v. *State,* 18 N.J. 442, 114 A.2d 1 (N.J. 1955). Although the jurisdictional doctrine is perhaps not limited to these historically-conditioned situations, its extension into new applications has been restrained by statutorily developed solutions which deal with problem areas into which *parens patriae* might otherwise have expanded. *California* v. *Frito-Lay, Inc., supra,* 474 F.2d 774, 776. An effort by the State of Georgia to use *parens patriae* in an antitrust context to assert the damage claims of its citizens was considered by this Court in *Georgia* v. *Pennsylvania R.R.,* 324 U.S. 439 (1945), without resolution of the basic issue of standing and without the development of usable guidelines. More recently, lower courts have denied standing to States on such a jurisdictional basis referring them instead to such remedies as might lie under class action procedures. *Hawaii* v. *Standard Oil of California,* 301 F. *Supp.* 982, 986 (D. Hawaii 1969); *Philadelphia Housing Authority* v. *American Radiator & Standard Sanitary Corp., supra,* 309 F.Supp. 1057, 1061; *California* v. *Frito-Lay, Inc., supra; In re Motor Vehicle Air Pollution Control Equipment, supra,* 481 F.2d 122. *Contra, State of West Virginia* v. *Chas. Pfizer & Co., supra,* 440 F.2d 1079, 1087 (dictum).

patriae is not a concept of Indian law and does not fully reflect the representative status being asserted here. If *parens patriae* status is available to the Government of India in this case, so be it; if not, that determination ought not to oust India as an official representative of its citizens.

REASONS FOR GRANTING THE WRIT

The Decision of the Court of Appeals has important consequences for the Administration of the Antitrust Laws in the Foreign Commerce of the United States and for American Foreign Economic Relations

1. The decision of the Court of Appeals is important in scope: In these antibiotics proceedings alone it affects foreign nations with very sizeable populations having important trade relations with the United States.[9] These claims place private antitrust enforcement in the foreign commerce at an important crossroads: Before these cases, there had been virtually no treble damage enforcement by foreign plaintiffs of any kind.[10] Now, nine sovereign states have

[9] The 1972 *Statistical Yearbook* published by the Statistical Office of the United Nations, New York, New York, provides the following population statistics: India 550 million; West Germany, 60 million; Colombia, 24 million; Iran, 29 million; Korea, 32 million. The use of antibiotics in these countries has been extensive, and but for limits imposed by poverty and price of antibiotics, this use would have been even more widespread throughout these populations.

[10] In its amicus brief before the Circuit Court the Department of Justice (at pp. 9-10) stated it knew of only two instances in which foreign plaintiffs had brought suit under the antitrust laws. *Moviecolor, Ltd.* v. *Eastman Kodak Co.,* 24 F.R.D. 325 (S.D.N.Y. 1959), *aff'd* 288 F.2d 80 (C.A. 2), *cert. denied,* 368 U.S. 821 (1961); and *Afran Transport Company* v. *National Maritime Union,* 169 F. Supp. 416 (S.D.N.Y. 1958); 175 F. Supp. 285 (S.D. N.Y. 1959). In the latter case, two foreign governments appeared

sought redress. If these initiatives are blocked, antitrust enforcement in the foreign commerce of the United States will revert to the somnolent past in which U.S. companies were virtually free from private monitoring of their antitrust compliance. Moreover, having been rebuffed in their efforts to secure redress by means of judicial recourse, foreign sovereigns may consider other, no doubt less-effective (and less-desirable) means to protect their national interests.

The preference for class actions (elevated by the Court of Appeals to an exclusionary rule based upon public policy considerations) may not entirely please the domestic States; but the States have in these very antibiotics proceedings been certified as class representatives under Rule 23 for very broad classes, including consumer classes.[11] But on the face of it, class actions in behalf of Indian consumers—and probably even for Indian wholesalers, retailers, hospitals and clinics—will not be certifiable.[12] An attempt to satisfy

as *amici curiae*. In *French Republic* v. *Saratoga Vichy Co.*, 191 U.S. 427 (1903), the Government of France brought a damage claim against a U.S. defendant for unfair competition. The true party in interest was not the Government however but a French private corporation. 191 U.S. at 438.

[11] *In re Antibiotic Antitrust Actions*, 333 F. Supp. 278, 284 (S.D.N.Y. 1971); *State of West Virginia* v. *Chas. Pfizer & Co., Inc.*, *supra*, 440 F.2d 1078, 1089-1091; *Indiana* v. *Chas. Pfizer & Co., Inc.*, 51 F.R.D. 493, 494 (S.D.N.Y. 1970); cf., *State of Illinois* v. *Bristol-Myers Co.*, 470 F.2d 1276 (U.S. App. D.C. 1971); *Hawaii* v. *Standard Oil Co., supra*, 405 U.S. 251, 266.

[12] Rule 23(c)(2) specifically requires that notice be given to class members in sufficient detail so they may choose to be included in or excluded from the class. Here, the giving of adequate notice to the foreign class would pose very difficult problems of class manageability which would strain the resources of the District Court. There are formidable language problems since notices would

Rule 23 requirements to maintain such classes will encounter overwhelming practical difficulties.[13] A foreign sovereign, must also consider its own public policy considerations. The road to class actions carries for a foreign sovereign, unlike a domestic state, the risk of unacceptable political consequences.[14] There is therefore no meaningful alternative to official representative status for the Government of India by which these damage claims can be brought to judicial consideration.

2. The United States is a major creditor country, having issued foreign assistance loans and grants to

be issued in over 12 languages; there are communication difficulties that are obvious in a nation of 550 million people; there are problems of literacy; and ultimately there is the conceptual hurdle of explaining to a foreign populace the relationship between individual purchases in the domestic Indian market and U.S. antitrust notions attending sales of the drug items in the foreign commerce of the United States. For all classes except importers the conceptual hurdle alone may be insurmountable.

[13] In the only attempt to have a class of any size certified whose members were all non-resident aliens, the Second Circuit in a recent securities case quickly concluded the matter was unmanageable. *Bersch* v. *Drexel Firestone, Incorporated*, 519 F.2d 974, 996-97 (C.A. 2 1975). The foreign class in *Bersch* was much smaller and would surely have raised fewer problems of manageability than the classes of Indian purchasers involved here.

[14] Conceivably, a class of importers might be manageable and certifiable under Rule 23. But India wishes to benefit consumers who ultimately absorbed the injury. Since importers are in many cases affiliates of defendants (by contractual arrangement or equity investment), a political desire to bring this action to benefit the general public should not be transformed into a special benefit only for importers. This is especially so, since India, like many capital importing countries, maintains investment incentive programs which allow repatriation of profits to foreign parents of local companies and a recovery by importers might well raise profit levels so as to justify the repatriation of dividends to defendants from these affiliated importers.

foreign nations for many years under bilateral aid programs governed by the Foreign Assistance Act of 1961 as amended, 22 U.S.C. §§ 2151 *et seq,* and prior legislation.[15] These foreign aid programs have had a significant impact in altering pre-existing foreign trade patterns, since foreign assistance funds have been tied overwhelmingly by legislative directive to procurement in the United States.[16] This has been especially true for foreign aid funds used for the purchase of antibiotics.[17] The funds made available

[15] The United States is also a major contributor to international lending organizations such as the World Bank which in turn lend funds to foreign governments.

[16] Thus, 22 U.S.C. § 2354 provides that foreign aid funds are available for procurement outside the United States only if the President makes certain determinations as to adverse effects upon the economy of the United States: *i.e.* labor surplus considerations, balance of payment considerations, and pricing. Other provisions dealing with the same considerations appear at 22 U.S.C. §§ 2161 (b)(6); § 2171(b)(5), (6), and the ultimate sentence of § 2171; § 2197(k); and § 2211(b)(4).

[17] Section 606(c) of the Foreign Assistance Act, 22 U.S.C. § 2356 (c) ties the purchase of drug items very closely to procurement in the United States:

> "Funds appropriated pursuant to this Chapter shall not be expended by the United States Government for the acquisition of any drug product or pharmaceutical product manufactured outside the United States if the manufacture of such drug product or pharmaceutical product in the United States would involve the use of, or be covered by an unexpired patent of the United States which has not previously been held invalid by an unappealed or unappealable judgment or decree of a court of competent jurisdiction, unless such manufacture is expressly authorized by the owner of such patent."

The motive force behind this provision is to benefit Chas. Pfizer & Co. by preventing off-shore purchase of tetracycline (one of the major broad-spectrum antibiotics involved in these proceedings) with foreign assistance funds. See, debate on the Foreign Assistance Act of 1961, 107 Cong. Rec. 16283 (1961) (Statement of Congressman Roudebush).

by the United States to India were used at various times and in significant quantities for the importation from the United States of antibiotics.[18]

The readiness and good grace with which debtor nations approach their debt burdens to the United States might well be influenced by the outcome of the issue of standing presented in these cases. For, if goods sold by defendants in substantial amounts to foreign importers were overpriced by virtue of anti-trust and fraud violations,[19] loan obligations associated with the funds borrowed by foreign governments to finance these purchases are not reduced by the amount of the overcharges. The foreign government must use its own means for securing refunds from the suppliers. And failing that recourse, the foreign governments may well be justified in taking a jaundiced view towards their obligations to repay in full tied-loan funds used to pay for such overpriced goods.[20]

[18] The record does not show what percentage of total purchases of antibiotics by Indian importers were made with foreign assistance funds from the United States or what percentage was accomplished with loans or grants; but it may be safely assumed that a not inconsiderable portion of purchases in the United States by Indian importers were made with such funds loaned or granted to India by the United States.

[19] In *State of West Virginia* v. *Chas. Pfizer & Co., supra,* 440 F.2d 1079, 1084, the court in related proceedings (involving domestic States which settled their claims in these antitrust antibiotics proceedings) noted that the formula which underlay the settlement plan was based upon a calculation that prices for antibiotics actually charged by defendants "contained an overcharge of 66-2/3 percent."

[20] But if a beneficiary country of U.S. foreign assistance can collect as a treble damage plaintiff, the United States may well be able to negotiate a refund to itself for a portion of the recovery attributable to the original foreign aid. This is essentially the ar-

3. Private U.S. corporations have made substantial investments in production and distribution enterprises abroad. From a U.S. public-policy perspective it is desirable to encourage foreign governments to bring disputes concerning important trade matters into U.S. courts and to litigate by means of damage actions allegations of fraud and impropriety significantly affecting their interests and the interests of their nationals. (It is after all a tribute to American justice that foreign governments are willing to bring claims on behalf of their citizenry for adjudication before American courts.) It would be better to encourage this tendency, and with it the rule of law, than to subject American enterprise to political reactions in host countries.

4. The Department of State has exhorted foreign nations to undertake initiatives in the area of antitrust by negotiating antitrust clauses in bilateral executive agreements concluded with foreign governments under authority of foreign assistance legisla-

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rangement worked out between the United States and domestic States on certain grant-in-aid programs to the domestic States for application in situations where a State subsequently appears as an antitrust plaintiff. See, *State of Minnesota* v. *United States Steel*, 299 F.Supp. 596, 610 n. 57 (D.Minn. 1969), vacated on other grounds 438 F.2d 1380 (C.A. 8 1971).

Recovery of damages by a foreign aid beneficiary country diminishes *pro tanto* the need by that country for additional foreign aid assistance and thereby benefits the U.S. taxpayer. Reprocurement of goods with funds attributable to the recovery can well be expected to be made in the United States. Benefits which may accrue to U.S. interests have been held to be relevant considerations in a determination whether a foreign plaintiff has standing to maintain suit in a U.S. court. *Constructores Civiles de Centroamerica, S.A.* v. *Hannah*, 459 F.2d 1183, 1192 (C.A. D.C. 1972).

tion.[21] Many Treaties of Friendship and Commerce with foreign nations contain undertakings by each contracting party to take antitrust action, *qua* sovereign, to safeguard the mutual trade of the two countries.[22]

These efforts would justifiably be viewed with cynicism by foreign governments if the opinion below is

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[21] *See e.g.*, Article II of the Economic Cooperation Agreement with the Government of Viet-Nam (a foreign sovereign plaintiff in these proceedings), September 7, 1951, 2 U.S.T. 2205, T.I.A.S. 2346, which states in pertinent part as follows:

> "In order to assure maximum benefits to the people of Viet-Nam from the assistance to be furnished under the present agreement by the Government of the United States of America, the Government of Viet-Nam will use its best efforts: • • • D. to cooperate with other countries to eliminate public or private restrictive practices hindering domestic or international trade."

[22] The Treaty of Friendship, Commerce and Navigation between the United States and the Republic of Korea (a foreign sovereign plaintiff in these antibiotics proceedings), entered into force November 7, 1957, 8 U.S.T. 2217, T.I.A.S. 3947, provides in Article XIII as follows:

> "The two Parties agree that business practices which restrain competition, limit access to market or foster monopolistic control, and which are engaged in or made effective by one or more private or public commercial enterprises, or by combination, agreement or other arrangement among such enterprises, may have harmful effects upon commerce between their respective territories. Accordingly, each Party agrees upon the request of the other Party to consult with respect to any such practice and to take such measures as it deems appropriate with the view to eliminating such harmful effects."

Substantially similar provisions are contained in the following treaties of friendship, commerce and navigation, among others, to which the United States is a party: Federal Republic of Germany, 7 U.S.T. 1858-59, T.I.A.S. 3593; Greece, 5 U.S.T. 1829, 1861-63, T.I.A.S. 3057; Ireland, 1 U.S.T. 785, 786, T.I.A.S. 2155; Israel, 5 U.S.T. 550, 569, T.I.A.S. 2948; Italy, 63 Stat. 2266, T.I.A.S. 1965; Nicaragua, 9 U.S.T. 449, 463, T.I.A.S. 4024; and Japan, 4 U.S.T. 2063, T.I.A.S. 2863.

allowed to stand. What good are such policies if the Federal courts tell foreign governments that they have no standing to assert the antitrust claims of their citizens, especially when no other means to judicial redress is available?

5. Foreign nations with free enterprise or mixed economies will find themselves precluded from asserting official representative standing by virtue of the decision of the Court of Appeals. But socialist and communist states can as a practical matter avoid this disability, since in those countries all imports are accomplished by governmental organs.

The Writ Should Be Granted To Review Important Issues Implicating the Sovereignty of Nations

1. The decision of the Court of Appeals makes no concession to foreign and international elements involved in these cases. The Eighth Circuit simply applied an analysis derived from cases involving the domestic states to the foreign sovereigns. But because the responsibilities of a foreign sovereign to its citizens differ greatly from those of a State to its citizens, it is surely more appropriate to look at the rules for standing that are applied to the United States.

When the United States acts as sovereign in bringing an action in its name for the benefit of private parties, its standing is established if one of three requirements is met: The United States itself must have a "pecuniary interest in the remedy sought"; or, it must be under an "obligation to the party who will be benefited to sustain an action for its use"; or, an "obligation to the general public exists which requires the United States to bring it". *United States* v. *San Jacinto Tin Co.*, 125 U.S. 273, 286 (1888);

cf., United States v. *Minnesota,* 270 U.S. 181, 194 (1925).[23]

In this case, the foreign sovereign brings to bear considerations which satisfy the requirements imposed upon the United States. These considerations contain elements which are absent in any analysis of the standing of domestic States.

(a) The "pecuniary interest" of petitioner derives from its absolute control of and from its property interest in the foreign currency reserves of the country.[24] All purchases in the import trade into India were accomplished with foreign currency made available by the petitioner to private importers. The importers acquired foreign currency from their government by paying over local currency at exchange rates established by the government.[25] When overcharges occurred in connection with import transactions, a smaller quantity of goods was obtained for the price paid than would otherwise have been the case if there had been no antitrust violations. The

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[23] The enfolding of the doctrine since *San Jacinto Tin* is set out and brought up to date in *United States* v *Brand Jewelers, Inc.*, 318 F. Supp. 1970 (S.D.N.Y. 1970).

[24] "Control of national currency and of foreign exchange is an essential governmental function". *French* v. *Banco Nacional de Cuba, supra,* 242 N.E. 2d 704, 715, see also, *Victory Transport* v. *Comisaria General,* 336 F.2d 354, 360 (CA 2 1964), *cert. denied* 381 U.S. 934 (1965).

[25] In the system of control practiced by petitioner, typical for nearly all countries maintaining strict exchange control systems, an importer must apply to the central bank of his government for a license to import goods. The grant of the license carries with it authorization to use foreign exchange through the domestic commercial banking system in the authorized amount.

importer may have been deprived of local currency on his purchase, but the all-precious foreign currency loss was sustained only by his government.[26]

Domestic States have no power or responsibility relating to the management of foreign exchange.[27]

(b) Whereas a State of the Union can show no "obligation to the general public" which requires it to bring an action to assert the damage claims of its citizens, the Government of India has such an obligation pursuant to its laws, its Constitution, and its relation as sovereign to its people under its social and political system and institutions. A U.S. court can freely examine the assertions of a State as to its obligation to its citizens to maintain a *parens patriae* action. But the claim of "obligation" interposed by the Government of India under its own laws cannot be challenged by an American court without raising serious problems of comity among sovereign states, treaty undertakings and international law.

With respect to comity.

(i) Considerations of comity—the avoidance of affront to a foreign so as not to embarrass the executive arm of the United States in the conduct of its foreign relations—have prompted courts to refrain

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[26] By virtue of its membership in the International Monetary Fund and 22 U.S.C. § 286h, the United States is committed, pursuant to Article VIII(2)(b) of the Articles of Agreement of the Fund, to pursue a national policy which safeguards the exchange control regulations of each member country. This national policy elevates to special importance matters concerning the foreign exchange concerns of member countries.

[27] *See,* cases cited *supra,* note 7a.

from investigations as to the conduct of a foreign sovereign within its own borders. U.S. courts properly decline to determine whether the act of a foreign government, taken assertedly in conformity with its own laws, complies with those requirements.[28] India's assertion of an obligation to its citizens to bring this action falls well within these traditional areas of self restraint in the name of comity.

(ii) The preference for class actions expressed by the Court of Appeals would, if it could be followed, create opportunities for affront which foreign sovereigns would find unacceptable. A determination under Rule 23 must be made that the sovereign is a fit representative of the class who will adequately represent the interests of the class. Even theoretically, it would be unusual for a foreign sovereign to be willing to have a foreign court consider issues so close to questions concerning the legitimacy of the government. Any disgruntled national or group which can manage to secure counsel can use the Rule 23 standards to attack its government in the foreign court.[29] Defend-

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[28] See, *Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 398, 415 n. 17 (1964), where the cases are collected. It is essentially also upon such notions—the implication of sovereignty—that doctrines relating to the sovereign immunity of foreign states, when they act in their sovereign as opposed to their commercial capacities, have been adopted by the lower courts and proclaimed by the Department of State. *Victory Transport* v. *Comisaria General, supra,* 336 F.2d 354; *Petrol Shipping Corp.* v. *Kingdom of Greece,* 360 F.2d 103 (C.A. 2 1965), *cert. denied,* 385 U.S. 931 (1966); *Premier Steamship Co.* v. *Embassy of Algeria,* 336 F.Supp. 507 (S.D.N.Y. 1971). The distinctions between commercial and sovereign acts have been set forth by the Department of State in the so-called "Tate Letter", 26 Department of State Bull. 984 (1952). This Court has not had occasion to consider the distinction articulated in the Tate Letter.

[29] In one of the State cases involved in these antibiotics proceed-

ants themselves can hold the foreign government hostage and embroil it in such "factual" considerations.[30]

With respect to treaty considerations.

Antitrust exhortations contained in treaty materials and legislation refer to the obligations of foreign sovereigns,[31] and not to domestic States. A treaty obligation imposed upon a sovereign to safeguard concerns affecting the public at large serves as one more justification for the assertion of standing by the sovereign to bring action in its sovereign capacity.[32]

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ings a group of Virginia residents challenged the fitness of the Attorney General of the Commonwealth of Virginia to be the class representative of consumers on grounds that his responsibility to the State and its political subdivision was antagonistic to the interests of individual citizens. *In re Antibiotic Antitrust Actions, supra,* 333 F.Supp 278, 296 (S.D.N.Y. 1971). It would certainly be an unacceptable affront to the sensibility of a foreign sovereign to have to litigate that kind of question concerning its fitness and interest in the matter with groups of its nationals before a foreign court.

[30] In a companion case involving the Philippines (the record of which was consolidated by the Court of Appeals for purposes of appeal), the plaintiff foreign sovereign has sought to have the District Court certify a class of private hospitals in the Philippines with itself as class representative. Defendants have challenged the fitness of the sovereign to represent the class. Portions of that challenge appear in the Appendix at 27a.

[31] *See supra,* notes 21-22 relating to the duties of foreign sovereign to eliminate private restrictive practices in their trade with the United States. Foreign governments are also adjured to refrain in their public acts, decrees and legislation from promoting "restrictive trade practices". See, 22 U.S.C. § 286k and Art. XX, General Agreement on Tariffs and Trade, 61 Stat. (5), (6); T.I.A.S. 1700.

[32] *See, Sanitary District of Chicago* v. *United States, supra,* 266 U.S. 405, at 425. The antitrust provisions in F.C.N. treaties, *see supra* notes 21-22, are of a special order. The President is directed at

With respect to international law.

Under international law when one state picks up the claims of its citizens and presents them for payment to the government of another state, the paying state does not inquire whether and to what extent the receiving state intends to pass on the proceeds of the payment to the nationals in whose behalf the claim is espoused.[33] The reason is obvious: It would offend basic notions of sovereignty for another sovereign to inquire into that relationship. Here, the Eighth Circuit is concerned with the due process rights of residents of the Punjab who purchased antibiotics from village pharmacists. In the view of the Court of Appeals, due process requires it to defend the right of those absent purchasers to choose their own representative to pursue their claims against

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22 U.S.C. § 2351(b)(4) to seek, "compliance by other countries or areas with all treaties of commerce and trade • • • and [to] take all reasonable measures • • • to secure compliance therewith". If by virtue of such treaty provisions standing in an official representative capacity is accorded another foreign sovereign, the citizens of India are entitled to equal treatment under "most favored nation" treaty provisions with India relating to property in the United States. *See, Article V, Convention as to Tenure and Disposition of Real and Personal Property* (with Great Britain), 31 Stat. 1939; T.S. 146; 1 Malloy 774 (1899); and Supplementary Convention. 32 Stat. 1914; T.S. 402; 1 Malloy 776 (1902).

[33] Indeed, the United States "can legally espouse on behalf of a national of the United States a formal claim through diplomatic channels and/or submit the claim for adjudication by an international arbitral tribunal without being requested to do so either formally or informally by the aggrieved national." A. Rovine, *Digest of U.S. Practice in International Law,* p. 332 (1973), quoting Fabian A. Kwiatec, Assistant Legal Adviser for International Claims in the Department of State, speaking on behalf of the United States.

defendants; and due process further requires the Court to deny its assistance to a confiscation by petitioner of the claims owned by its nationals.

But petitioner's claims in this regard are no different from where a sovereign espouses a private claim and presents it for payment to another government. Due process is no more an issue here than where the Executive Branch makes an award to a foreign government through diplomatic means on an international claim brought by the foreign sovereign in behalf of certain of its citizens.[34] Review by this Court of the incompatibility of doctrine in this area of international claims is required.

2. The preference for class actions as an overriding public policy finds little support in the realities which obtain where the foreign sovereign is plaintiff. The foreign sovereigns have undertaken to route so much of any recovery that can be so routed to institutions and individuals who were aggrieved by the actions of defendants. The burden therefore lies upon the foreign governments, acting within their own countries and with due sensitivity to local procedures

[34] The perception of a due process inhibition by the Court of Appeals must surely relate to the notion that the relationship between petitioner and its citizens becomes a matter of constitutional concern because "state action", in a Fifth Amendment sense, is involved whenever a federal court lends its assistance to a litigant. *See, Shelley* v. *Kraemer,* 334 U.S. 1, 14 (1948). With that justification for the court's concerns, the claim for payment by the foreign sovereign must be viewed as a request to an arm of the U.S. Government: the request is then to the U.S. Government, through its judiciary, to enforce payment to petitioner. Viewed in this manner, the relationship between the two governments justifies in special measure the application of the international law rule of not looking behind the claim of the espousing state.

and the needs of their citizenry, how best to carry out these undertakings.[35]

The drafters of Rule 23 expressed no supposition or intention that the Rule should apply as a preferred mode of procedure in other countries, in which other languages, customs, and economic conditions prevail. The "due process" rights of Indian consumers and other classes of aggrieved antibiotics users and purchasers will be safeguarded, *mutatis mutandis,* by the Indian Government under its own Constitution and laws.[36]

3. Contrary to the fears of the Court of Appeals, there is no danger that defendants will be subjected to the possibility of multiple recoveries if the foreign sovereigns are accorded standing. Petitioner claims

[35] The court can fashion its decree in any manner in which the dictates of prudence and common sense suggest, so that the undertaking of the foreign sovereign plaintiff to route funds back to its citizens under its procedures is in fact an undertaking made to the court and reduced by it into proper legal form. *Cf., Carnivale Bag Co., Inc.* v. *Slide-Rite Mfg. Corp.,* 395 F. Supp. 287, 292 (S.D. N.Y. 1975); *State of Washington* v. *American Pipe & Construction Co.,* 274 F. Supp. 961, 965 (D.C. Cal., Hawaii, Or. & Wash. 1967). *State of Minnesota* v. *United States Steel Corporation,* 308 F.Supp. 963 (D. Minn. 1970); *State of West Virginia* v. *Pfizre, supra,* 440 F.2d 1079.

[36] An undertaking by the foreign sovereign should suffice. There is an analogy in sovereign immunity cases. A Court which issues judgment against a foreign government (in a case where commercial activity by the foreign sovereign underlies the liability) is aware the sovereign cannot be compelled to pay and its funds cannot be levied upon in satisfaction of the judgment. *Dexter & Carpenter, Inc.* v. *Kunglig Jarnvagsstyrelson,* 43 F.2d 705 (C.A. 2, 1930); *Weilamann* v. *Chase Manhattan Bank,* 21 Misc. 2d 1086, 192 N.Y.S. 2d 469 (Sup. Ct. 1959). But the law assumes the foreign government will nevertheless pay the judgment out of respect for the institutions of the forum.

that under its law and practice it is the official representative of its aggrieved nationals with capacity to assert these claims. Petitioner surely has jurisdictional authority within India over its resident nationals. Thus, petitioner can undertake to the District Court that no additional claims against defendants will be brought by its resident nationals. That assurance can most confidently be made in these proceedings, since the time-limitation in which new claims can be brought has expired.[37]

Judge Lord conceived of *res judicata* effect attaching to any judgment in behalf of the foreign sovereign as against any new or additional private claim which was redundant (App. 22a). It would appear only necessary for the District Court to provide in any judgment which it enters that the foreign sovereign will hold the defendants harmless and will assume the burden of any defense in the event that redundant claims are perchance brought by resident nationals of the foreign sovereign.[38]

5. The Court of Appeals decided that the assertion of official representative standing by a foreign

[37] Of course, if India can proceed as official representative, the class action allegations will not be presented to the District Court for Rule 23 certification.

[38] *Compare, State of Washington* v. *American Pipe & Construction Co., supra,* 274 F. Supp. 961, 965:

> Defendant has also raised the spector of double liability it sued by the general contractors. Defendant's argument does nothing more than present this court with a hypothetical question concerning the allocation of provable injury, not with that of the standing to maintain a cause of action.

sovereign constitutes a "taking" or a confiscation of the property of its citizens, bringing to bear American public policy considerations that refuse to give effect to foreign confiscations. The implications of this holding upon the espousal of claims by foreign states are serious.

Here, there has been no "taking". The undertaking of the foreign sovereigns to route payments to aggrieved individuals (and only to use residue funds which cannot be so routed for related public purposes) indicates that such "taking" as may exist is in reality merely a form of representation. If there is a taking in a temporary sense, it is only for the purpose of asserting the claim. And the taking is in fact *with* rather than without compensation.[39]

Moreover, if there is a taking, it is accomplished by a foreign government under its own law and in a manner that affects only its resident nationals. International law does not concern itself with such situations or with questions raised by such foreign governmental actions. *United States* v. *Belmont,* 301 U.S. 324, 332 (1936). The act of state doctrine precludes an investigation into such questions concerning confiscation.

The Court of Appeals suggests that the antitrust claim represents intangible property—a chose in ac-

[39] The compensation is necessarily accomplished after the fact, that is, after recovery rather than before. For it would be impossible for petitioner to determine an appropriate value to pay each aggrieved purchaser in India before the claim as a whole had been successfully prosecuted. The claims here are not liquidated sums which defendants admit are due and owing. Quite on the contrary: the claims are strongly contested on issues of liability as well as on other grounds.

tion—located in the United States. Given such a situs the act of state doctrine does not apply. But this decision is the first that has held that a foreign sovereign may not take a contested unliquidated claim of its citizens, arising out of transactions within its territory, simply because that claim is "sited" in the United States.

The territoriality limitation on the act of state doctrine has frequently been alluded to by this Court, but it has not been closely defined.[40] Whatever the scope may be of that requirement concerning corporeal property or its proceeds upon sale, the chose in action here is hardly that form of "property" which suggests itself as creating an exception to the application of act of state. Justice Frankfurter, concurring in *United States* v. *Pink,* 315 U.S. 203, 239 (1941), doubted whether an intangible right located in the United States should ever be viewed as that form of property which creates an exception to act of state.[41] It is a long stretch indeed from rights to tangible

[40] The doctrine in its traditional formulation applies to "public acts a recognized sovereign committed within its own territory," *Banco Nacional de Cuba* v. *Sabbatino, supra,* 376 U.S. 398, 401; or to "acts done within their own states in the exercise of governmental authority," *Underhill* v. *Hernandez,* 168 U.S. 250, 252 (1897).

[41] The matter has been made more ambiguous by the enactment of the "Hickenlooper Amendment", 22 U.S.C. § 2370(e)(2), by which the Congress overturned much of *Banco Nacional de Cuba* v. *Sabbatino, supra,* dealing with the act of state doctrine. Admitting even that Hickenlooper did not overrule all of *Sabbatino,* it nevertheless remains that in the only legislative statement on act of state the Congress limited itself to tangible "property" rights and excluded contract rights from its attention. See, *French* v. *Banco Nacional de Cuba,* 23 N.Y.2d 46, 242 N.E.2d 704, 714-15 (N.Y. 1968).

property or to its proceeds (or even from liquidated claims such as bank accounts or admitted debts for goods received)—at issue in act of state cases that have reached this Court—and the notion adopted by the Court of Appeals that a contested antitrust claim must be located in the United States, thus precluding the application of the act of state doctrine.

The Writ Should Be Granted to Resolve Conflicts Between Decisions of Courts of Appeal and to Resolve Conflicts in Principle Between the Decision of the Eighth Circuit and Opinions of This Court.

1. Whereas the Eighth Circuit finds an overwhelming public policy preference for the class action (even if this preference destroys all hope of remedy), the Second Circuit in *State of West Virginia* v. *Chas. Pfizer & Co., supra,* 440 F.2d 1079 expressed a different view in the $100 million settlement cases involving the domestic States. The Second Circuit reviewed a settlement which the District Judge approved and had channelled into a class-action arrangement. In dictum, the Second Circuit observed that it would perhaps have been more proper for the States to have maintained the actions as *parens patriae,* 440 F.2d at 1089.

The dictum of the Second Circuit appeared as an invitation: *Parens patriae* standing would be accorded to domestic States in new complaints in these very same antibiotics proceedings; and, by a parity of reasoning, official representative standing would be accorded foreign sovereigns.[42] The attitude of the Second Circuit conflicts with the preclusive hostility

[42] It should be noted that most of the foreign sovereigns' complaints, including that of India were initiated after the Second Circuit opinion had been published.

to representative forms of action expressed by the Eighth Circuit.

2. Whereas the Eighth Circuit finds in the localization of the antitrust claim in the United States a fatal flaw barring application of the act of state doctrine, *French* v. *Banco Nacional de Cuba, supra,* 242 N.E.2d 704, 712-15, suggests a different view of the territorial requirement as it concerns intangible property. The *French* court considered contract rights as falling outside the Hickenlooper exception to act of state.

3. The Eighth Circuit adopts an approach that would deny foreign citizens their day in court; this Court has often held that the antitrust laws are not to be interpreted to deny plaintiffs an opportunity to challenge antitrust violations.[43] For example, in *Hanover Shoe* v. *United States Machinery Corp.,* 392 U.S. 481 (1968), this Court rejected the "passing-on" defense out of concern that it could be raised to bar suits by all subsequent purchasers except the consuming public. Members of the consuming public would each have only a tiny stake in a lawsuit and little interest in attempting a class action.

Hanover Shoe clearly implies that the most desirable objective would be to route an antitrust damage recovery to individual consumers; but if that is not practicable in major litigation, where each consumer has only a tiny interest, intermediate purchasers

[43] See discussion in *State of West Virginia* v. *Pfizer, supra,* 440 F.2d 1076, 1087-88; *Perma Life Mufflers, Inc.* v. *International Parts Corp.,* 392 U.S. 134 (1968).

should be allowed to put forward the claim. The alternative would be to allow those who violate the antitrust laws by price fixing or predatory practices to retain the fruits of their illegality—their "pot of gold".[44]

Here, the Eighth Circuit turns the reasoning of *Hanover Shoe* on its head. It bars the road to consumer recovery via the only effective machinery which can assure such recovery—the official representative action, with an undertaking by the Government of India to accomplish refunds to consumers. Review by this Court is required to provide guidelines on what is an important issue: If as a practical and political matter, private damage actions by large foreign classes are foreclosed, whether foreign sovereigns shall be allowed official representative standing to assert the claims of their resident nationals.

4. Whereas this Court has limited the right of a defendant to assert as a defense the constitutional

[44] The term was adopted by Judge Lord, *In re Antibiotic Antitrust Actions, supra,* 333 F. Supp. 278, 282-83:

> It should be noted at the outset that difficulties in management are of significance only if they make the class action a *less* "fair and efficient" method of adjudication than other available techniques. This perspective is particularly important in the present cases where the defendants, after reciting potential manageability problems, seem to conclude that no remedy is better than an imperfect one. The court would be hesitant to conclude that conspiring defendants may freely engage in predatory price practices to the detriment of millions of individual consumers and then claim the freedom to keep their ill-gotten gains which, once lodged in the corporate coffers, are said to become a "pot of gold" inaccessible to the mulcted consumers because they are many and their individual claims small.

rights of persons not before the court,[45] here (and especially with respect to the "taking" argument), the Eighth Circuit accepts defendant's arguments on protection of the property rights of absent Indian nationals. In cases involving a "taking" by a foreign government in which public policy considerations of the forum defeated an act of state defense the persons aggrieved by the taking were before the court.[46]

The propriety of a defendant's raising such a constitutional defense must be related also to the constitutional objections surrounding the invocation of Rule 23 class action requirements. A defendant may be heard to complain that it will be subjected unfairly to duplicative recoveries if class action procedures are not followed; but where, as here, that risk does not exist, the principle put forward by this Court as to who may raise constitutional objections would appear to foreclose defendants from making such arguments.[47]

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[45] *See, New York ex. rel. Hatch* v. *Reardon,* 204 U.S. 152 (1906); *Yazoo & M. Valley R. Co.* v. *Jackson Vinegar Co.,* 226 U.S. 217 (1912); *Standard Stock Food Co.* v. *Wright,* 225 U.S. 540 (1912); *Rosenthal* v. *New York,* 226 U.S. 260 (1912); *Tileston* v. *Ullman,* 318 U.S. 44 (1943). There are exceptions to this rule in limited cases where the party asserting the right stands in close relation to the absent holder of the right. *Griswold* v. *Connecticut,* 381 U.S. 479 (1965). Such is clearly not the case here.

[46] The cases are collected for the United States, Canada, and the United Kingdom in Whitman's Digest of International Law, Dept. of State, 1968, pp. 54-76. In each case it is the aggrieved individual (and not the defendant) who urged that effect not be given to the act of confiscation of the foreign sovereign.

[47] In *State of Minnesota* v. *United States Steel Corp., supra,* 308 F.Supp. 963, 965 the Court stated:

> The reimburser, the State of Minnesota is suing and the reimbursees, the various counties, are not. Again, however, there is no duplication of claims since the various reimbursee Counties did not and cannot now become members of the class of plaintiffs and as to them the statute of limitations clearly has run . . . As to those Counties who joined the class timely in these cases, the court will be vigilant to prevent any double recovery. The court does not believe it lies in the mouth of those who have conspired to break the law, (if in fact such is subsequently proven) to avoid their just deserts under the circumstances of this case on a technical defense as to who has standing to sue. If in fact the prices of steel were conspiratorially higher than otherwise they would have been. someone paid the higher price and it comes with poor grace to argue that the wrong party is suing, so long as there is no danger of duplicity of claims. *Supra,* 308 F. Supp. 963, 965.

The foreign nations involved in these antibiotics cases, the international foreign community in general, and the lower federal courts require the assistance of this Court in resolving these conflicts and review of issues of importance and urgency raised by the decision of the Court of Appeals.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari be granted.

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Appendix A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 74-1680, 74-1847 and 74-1870

No. 74-1680

ON PETITION FOR WRIT OF MANDAMUS

PFIZER, INC., AMERICAN CYANAMID COMPANY, BRISTOL-MYERS COMPANY, SQUIBB CORPORATION, OLIN CORPORATION AND THE UPJOHN COMPANY, *Appellants,*

v.

HONORABLE MILES W. LORD, United States District Judge, *Respondent,*

and

THE REPUBLIC OF VIETNAM, THE IMPERIAL GOVERNMENT OF IRAN, THE REPUBLIC OF THE PHILIPPINES BY AND THROUGH THE CENTRAL BANK OF THE PHILIPPINES, *Appellees.*

No. 74-1847

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

PFIZER, INC., AMERICAN CYANAMID COMPANY, BRISTOL-MYERS COMPANY, SQUIBB CORPORATION, OLIN CORPORATION AND THE UPJOHN COMPANY, *Appellants,*

v.

THE REPUBLIC OF VIETNAM, THE IMPERIAL GOVERNMENT OF IRAN, THE REPUBLIC OF THE PHILIPPINES BY AND THROUGH THE CENTRAL BANK OF THE PHILIPPINES, *Appellees.*

No. 74-1870

ON PETITION FOR WRIT OF MANDAMUS

PFIZER, INC., AMERICAN CYANAMID COMPANY, BRISTOL-MYERS COMPANY, SQUIBB CORPORATION, OLIN CORPORATION AND THE UPJOHN COMPANY, *Appellants,*

v.

HONORABLE MILES W. LORD, United States District Judge, *Respondent,*

and

THE GOVERNMENT OF INDIA, *Appellee.*

Submitted: March 31, 1975
Filed: August 27, 1975

Before GIBSON, *Chief Judge,* LAY and ROSS, *Circuit Judges.*
LAY, *Circuit Judge.*

Several foreign governments [1] have filed antitrust suits alleging that the defendants,[2] six major pharmaceutical firms, conspired to fix prices on certain broad-spectrum antibiotics purchased by the plaintiff governments and

[1] The governments involved in this appeal are the Government of India, the Imperial Government of Iran, the Republic of the Philippines, and the Republic of Vietnam. Several other governments filed similar suits after entry of the orders from which these appeals were taken.

[2] The defendants are Pfizer, Incorporated, American Cyanamid Company, Bristol-Myers Company, Squibb Corporation, Olin Corporation and the Upjohn Company.

their citizens.[3] The cases were consolidated in the District of Minnesota for pretrial proceedings and for trial with numerous other suits known collectively as the Antibiotic Antitrust Cases, and are now pending before Judge Miles Lord. The history and background of this litigation have

[3] After a new government gained power in South Vietnam, we requested briefs of the parties and the United States as amicus curiae on the effect of those events on the right of the governmnt known as The Republic of Vietnam (RVN, the former government) to prosecute this action.

The Justice Department contacted the State Department to ascertain whether the United States currently recognized any government for the territory of South Vietnam. The State Department replied in the negative, stating that the United States no longer recognized the RVN and that it had not yet recognized the new *de facto* government either. The State Department indicated that it did not contemplate any change in this posture in the near future, and it recommended that RVN's suit be dismissed rather than suspended.

The rule is that unrecognized governments may not maintain suits in state or federal courts. *Guaranty Trust Co.* v. *United States,* 304 U.S. 126, 136-41 (1938); *Federal Republic of Germany* v. *Elicofon,* 358 F.Supp. 747 (E.D.N.Y. 1972), *aff'd.* 478 F.2d 231 (2nd Cir. 1973), *cert. denied,* 415 U.S. 931 (1974); *accord, Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 398, 408-12 (1964).

Dismissal without prejudice of Vietnam's claim would seem to extinguish any possibility for the nation of Vietnam to collect the damages it claims, since the statute of limitations apparently ran in 1974. Presumably, then, even if a new government were soon recognized, a new action could not be timely filed.

Another possibly proper course might be to suspend rather than dismiss the proceeding with regard to Vietnam for a reasonable time to see if a new government will be recognized, and if so, whether it would want to pursue this litigation. *See, e.g., Bank of China* v. *Wells Fargo Bank & Union Trust Co.,* 190 F.2d 1010 (9th Cir. 1951); *Republic of China* v. *Merchants Fire Assur. Corp.,* 30 F.2d 278 (9th Cir. 1929); *Government of France* v. *Isbrandtsen-Moller Co., Inc.* 48 F. Supp. 631 (S.D.N.Y. 1943). Since we do not pass on the question of whether a foreign sovereign has stand- as a "person" under § 4 of the Clayton Act, the district court will

been summarized in *Pfizer, Inc.* v. *Lord,* 456 F.2d 532 (8th Cir.), *cert. denied,* 406 U.S. 976 (1972).

The foreign governments assert in their complaints three theories of recovery, the last two of which would seem to be mutually exclusive since they involve the same claims. First, the governments ask treble damages based on their own purchases of defendants' antibiotics. Second, they sue under a *parens patriae* claim as "official representative" of their individual and corporate citizens who purchased defendants' products. Third, they assert their right to serve as representatives of the class of all their citizens who have treble damage claims against defendants.

The defendants moved to dismiss the first claim on the ground that a foreign government is not a "person" entitled to bring a treble damage action under Section 4 of the Clayton Act. They asked dismissal of the second or official representative theory on the ground that absent formal assignment of these claims the governments could not sue on them outside the class action rules of Fed. R. Civ. P. 23. The district court denied both motions.

The defendants seek reversal of these interlocutory rulings:

> (1) That foreign governments are "persons" entitled to sue for treble damages under § 4 of the Clayton Act; and
>
> (2) That foreign governments may sue to collect the treble damage claims of their citizens, without complying with the requirements of Fed. R. Civ. P. 23 for class actions.

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have to face the question of suspension or dismissal on remand. We need not decide whether Vietnam's *parens patriae* claim brought on behalf of its nationals should be dismissed or suspended since as we shall discuss the *parens patriae* claim fails to state grounds for relief.

I. Mandamus.

The first issue, that is, whether the foreign governments are persons within the meaning of § 4 of the Clayton Act, is presented here by writ of mandamus, since the district court refused to certify the question for interlocutory appeal under 28 U.S.C. § 1292(b).[4] We do not reach the merits of this question since in our view mandamus does not lie to review this ruling of the district court.

The traditional use of the writ in aid of appellate jurisdiction has been to confine a lower court to a lawful exercise of its prescribed jurisdiction. Thus, "[t]he writ is appropriately issued . . . when there is a 'usurpation of judicial power' or a clear abuse of discretion." *Schlagenhauf* v. *Holder,* 379 U.S. 104, 110 (1964); *River Valley, Inc.* v. *Dubuque Cty.,* 507 F.2d 582, 585 (8th Cir. 1974). However, mandamus is not to be used when the most that can be claimed is that the district judge may have erred in ruling on a question clearly within his jurisdiction. *Will* v. *United States,* 389 U.S. 90, 104 (1967).

The district court was presented with a difficult question of statutory interpretation, a question apparently of first impression. Even if its decision were erroneous (and we intimate no view on the merits), under the circumstances of this case it would not constitute a clear abuse of discretion.

Further, the mere fact that a court might err even on

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[4] The defendants also challenge the propriety of the district court's refusal to certify this question under § 1292(b). This court is without jurisdiction to review an exercise of the district court's discretion in refusing such certification. *See United States* v. *687.30 Acres of Land,* 451 F.2d 667 (8th Cir. 1971), *cert. denied sub nom., Winnebago Tribe* v. *United States,* 405 U.S. 1026 (1972); *accord, Leasco Data Processing Equip. Corp.* v. *Maxwell,* 468 F.2d 1326, 1344 (2nd Cir. 1972) (Friendly, J.); Note, *Interlocutory Appeals in the Federal Courts Under 28 U.S.C. § 1292(b),* 88 Harv. L. Rev. 607, 616-617 (1975).

jurisdictional questions does not necessarily amount to a usurpation of power making mandamus appropriate.

> [J]urisdiction need not run the gauntlet of reversible errors. The ruling on a question of law . . . was made in the course of the exercise of the court's jurisdiction to decide issues properly brought before it. . . . Its decision against petitioner, even if erroneous—which we do not pass upon—involved no abuse of judicial power.

River Valley, Inc. v. *Dubuque City, supra,* at 585, quoting from *Bankers Life & Cas. Co.* v. *Holland,* 346 U.S. 379, 382 (1953).

In *Stein* v. *Collinson,* 499 F.2d 91 (8th Cir. 1974), our court refused to reach the merits of a petition for writ of mandamus on a jurisdictional question arising out of a Chapter X reorganization proceeding. The court quoted the following from *American Airlines* v. *Forman,* 204 F.2d 230, 232 (3rd Cir. 1953):

> It is true that this petition . . . challenges what can fairly be called a jurisdictional ruling. But that difference alone is not enough to make a peremptory writ appropriate. . . . The challenged assumption or denial of jurisdiction must be so plainly wrong as to indicate failure to comprehend or refusal to be guided by unambiguous provisions of a statute or settled common law doctrine. If a rational and substantial legal argument can be made in support of the questioned jurisdictional ruling, the case is not appropriate for mandamus . . . even though on normal appeal a reviewing court might find reversible error.

499 F.2d at 94.

Accordingly, the petition for a writ of mandamus must be denied.

II. Foreign Governments Suing As Parens Patriae on Behalf of Their Citizens in Antitrust Damage Suits.

The district court did certify for appeal under 28 U.S.C. 1292(b) its order holding that the foreign governments may sue as *parens patriae* on behalf of their individual and corporate citizens without notifying the citizens or fulfilling the other requirements of a Rule 23 class action, and may "apply the proceeds from the litigation to the benefit of their citizens as a whole." Misc. Order No. 74-37, Appendix at 18, 21. The district court recognized that several recent decisions had denied to states of the United States the right to bring similar *parens patriae* actions on the grounds that the defendants might be subjected to duplicate liability, *see e.g., Hawaii* v. *Standard Oil Co.,* 405 U.S. 251, 264 (1972); or, if the state suit barred the citizens' claims, that so to "take" their damage claims would be a deprivation of property without due process. *See In re Multidistrict Vehicle Air Pollution Control Equip.,* 481 F.2d 122 (9th Cir.), *cert. denied sub nom., Morgan* v. *Automobile Mfg. Assn.,* 414 U.S. 1045 (1973); *California* v. *Frito-Lay, Inc.,* 474 F.2d 774 (9th Cir.), *cert. denied* 412 U.S. 908 (1973); *Philadelphia Housing Auth.* v. *American Radiator & Standard Sanitary Corp.,* 309 F. Supp. 1057 (E.D. Pa. 1969), *aff'd.,* 438 F.2d 1187 (3rd Cir. 1970). *Cf. In re Hotel Telephone Overcharges,* 500 F.2d 86 (9th Cir. 1974); *Eisen* v. *Carlisle & Jacquelin,* 479 F.2d 1005, 1012 (2nd Cir. 1973), *aff'd on other grounds,* 417 U.S. 156 (1974); *West Virginia* v. *Chas. Pfizer & Co.,* 440 F.2d 1079 (2nd Cir. 1971).

The district court held these objections not applicable here because foreign governments and their resident nationals were concerned. The court found that defendants could not be threatened with duplicate liability because the governments' suit could be given *res judicata* effect and, in any event, the practical difficulties facing foreign nationals would generally prevent them from filing their own suits.

Due process objections to failure to notify the citizens of the litigation and to permit them to participate directly in it and its proceeds, even though it would bar their claims, were dismissed by the court on the ground that "the relationship between a foreign government and *its* citizens is not restricted by the Constitution of the United States." *Misc. Order No. 74-37, Appendix at 18, 21* (emphasis original).

We reverse, and hold that the plaintiff governments may not sue on behalf of their citizens' antitrust damage claims as *parens patriae*. A *parens patriae* action cannot be brought to collect the damage claim of one legally entitled to sue in his own right. The mere fact that the claimant or creditor is a foreign national does not afford him or his government access to judicial procedures barred to domestic creditors. Finally, we are unable to dismiss so easily as did the district court the due process implications of the procedure plaintiffs ask us to approve. In our view, plaintiffs may represent their citizens' damage claims only if they can do so within a Rule 23 class action.

Suits by a sovereign in the *parens patriae* capacity have traditionally been limited to certain narrow areas.[5] Under English law, the king had the prerogative to act as a guardian of persons under such legal disabilities as infancy, incompetency and insanity. In addition, the king superintended charitable uses. In the United States, these *parens patriae* prerogatives were expanded to include the right of a state to sue for the general welfare of its citizens

[5] The use of *parens patriae* suits by the state on behalf of its citizens is ably discussed in Malina & Blechman, *Parens Patriae Suits for Treble Damages Under the Antitrust Laws*, 65 Nw. U. L. Rev. 193 (1970); Comment, *Wrongs Without Remedy: The Concept of Parens Patriae Suits for Treble Damages Under the Antitrust Laws*, 43 S.Cal. L. Rev. 570 (1970); Comment, *State Protection of Its Economy and Environment: Parens Patriae Suits for Damages*, 6 Colum. J. L. & Soc. Prob. 411 (1970).

at large, "to prevent or repair harm to its '*quasi-sovereign*' interests." *See Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 257-258 (1972).

Quasi-sovereign interests were defined by the Supreme Court as "interest[s] apart from [those] of particular individuals who may be affected," *Georgia* v. *Pennsylvania R. Co.*, 324 U.S. 439, 451 (1945), and are different from the sovereign's proprietary interests. The latter relate to its direct contracts for purchase of goods and services. Generally these quasi-sovereign interests have been limited to harm to a state's physical environment and relief sought has been injunctive rather than damages. Thus in the area of public nuisance states have been recognized as proper parties to vindicate the quasi-sovereign claims in *parens patriae* suits. *See e.g., Pennsylvania* v. *West Virginia*, 262 U.S. 553 (1923) (enjoining interference with flow of natural gas), *Kansas* v. *Colorado*, 206 U.S. 46 (1907) (enjoining diversion of water from an interstate stream), *Missouri* v. *Illinois*, 180 U.S. 208 (1901) (enjoining discharge of sewage into the Mississippi). This right was recognized in *Georgia* v. *Tennessee Copper Co.*, 206 U.S. 230, 237 (1907), where quasi-sovereign interests were described by Mr. Justice Holmes as "independent of and behind the titles of its citizens, in all the earth and air within its domain."[6]

[6] Early cases which rejected a state's right to file a *parens patriae* claim were decided on the narrow ground that the Supreme Court lacked original jurisdiction under Article III, § 2 when the state was not asserting a separate interest from its citizens. Thus, in *Oklahoma* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 220 U.S. 277 (1911), Oklahoma sought to assert rights of shippers against a common carrier to restrain it from charging unreasonable rates within its jurisdiction. The Supreme Court denied the state the right to file an original suit in the Supreme Court since the suit did not involve any infringement of power of the State but rather special damage to its shippers. The Court observed:

> We are of the opinion that the words, in the Constitution, conferring original jurisdiction on this court, in a suit "in which a State shall be a party," are not to be interpreted as

The Supreme Court did hold in *Georgia* v. *Pennsylvania R. Co.*, 324 U.S. 439 (1945) that Georgia might have the requisite separable interest to sue for damage to her general economy from an alleged railroad price-fixing conspiracy. In a more recent decision, however, the court indicated that such an interest of a state is not susceptible of measurement, that is, that injuries to the general economy are mainly just the sum of injuries to individual consumers and businesses, and hence, that the quasi-sovereign interest in the general economy could not support a *parens patriae* suit for damages under the Clayton Act. *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251 (1972).[7]

The interest relied on in the present case is much different, however, from those previously recognized in *parens patriae* suits. The plaintiff governments assert no quasi-sovereign interest, their only interest is proprietary

conferring such jurisdiction in every cause in which the State elects to make itself strictly a party plaintiff of record and seeks not to protect its own property, but only to vindicate the wrongs of some of its people or to enforce its own laws or public policy against wrongdoers, generally.

Id. at 289.

See also Oklahoma v. *Cook*, 304 U.S. 387 (1938).

[7] In 1969 the State of Hawaii sought to recover treble damages for overcharges for petroleum products sold to the State itself (the first or "proprietary" count), for damages to the general economy (the second or *parens patriae* count), and as the representative plaintiff for the class of all citizens with treble damage claims (the third or class action count). The district court dismissed the class action count and that was not appealed. The Supreme Court affirmed the Ninth Circuit's holding that the State could not recover for damages to the general economy under the *parens patriae* count. 405 U.S. 251 (1972), *aff'g. Hawaii* v. *Standard Oil Co.*, 431 F.2d 1282 (9th Cir. 1970). The Court held that the "business or property" limitation in the Clayton Act's treble damage provision meant that only damages to the State's commercial interests or enterprises were recoverable by the State; damage to the general economy was not compensable under the Act. 405 U.S. at 265. *See also In re Multidistrict Vehicle Air Pollution*, 481 F.2d 122, 126 (9th Cir. 1973).

in nature. This would seem to give the governments standing to bring a class action on behalf of their citizens.[8] The governments assert, however, that a class action would not be financially feasible given the Supreme Court's decision in *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974). They ask that we expand the concept of *parens patriae* to permit them to sue on behalf of persons legally entitled to sue on their own behalf, but as a practical matter generally unable to do so.

While there are no reported decisions on the right of a foreign government to prosecute such an action, in several recent instances domestic state governments have attempted to do so. So far none has been permitted to recover on that theory, and the Supreme Court has expressed a strong preference for class actions instead.

In *Hawaii*, the Supreme Court referred to the state's failure to appeal the dismissal of its class action count, and then said in *dicta*:

> We note in passing the State's claim that the costs and other burdens of protracted litigation render private citizens impotent to bring treble-damage actions, and thus that denying Hawaii the right to sue for injury to her quasi-sovereign interests will allow antitrust violations to go virtually unremedied. Private citizens are not as powerless, however, as the State suggests.
>
> Congress has given private citizens rights of action for injunctive relief and damages for antitrust violations without regard to the amount in controversy. 28 U.S.C. § 1337; 15 U.S.C. § 15. Rule 23 of the Federal Rules of Civil Procedure provides for class actions that may enhance the efficacy of private actions by permitting citizens to combine their limited resources

[8] For purposes of determining this question only, we will assume without deciding that the district court was correct in holding that foreign governments are "persons" entitled to bring treble damage actions under § 4 of the Clayton Act.

> to achieve a more powerful litigation posture. The District Court dismissed Hawaii's class action only because it was unwieldy; *it did not hold that a State could never bring a class action on behalf of some or all of its consumer citizens.* . . . The fact that a successful antitrust suit for damages recovers not only the costs of the litigation, but also attorney's fees, should provide no scarcity of members of the Bar to aid prospective plaintiffs in bringing these suits.
>
> *Parens patriae actions may, in theory, be related to class actions, but the latter are definitely preferable in the antitrust area.* Rule 23 provides specific rules for delineating the appropriate plaintiff-class, establishes who is bound by the action, and effectively prevents duplicative recoveries.

405 U.S. at 265-66 (emphasis added).

This strong preference for class actions over *parens patriae* has been repeatedly expressed. In *Philadelphia Housing Auth.* v. *American Radiator & Standard Sanitary Corp.*, 309 F.Supp. 1057 (E.D. Pa. 1969), Kansas and California sought to collect the treble damage claims of individual citizens via the *parens patriae* and class action routes. Chief Judge John Lord held the *parens patriae* claims to be "without legal foundation or policy support," *id.* at 1063, and an attempt to circumvent the protective limitations of Rule 23.

> Rather than provide a remedy to small-stake consumers allegedly denied by reasons of practicality the opportunity to bring actions available to other class action plaintiffs, allowance of the proposed claims would simply permit circumvention of the restrictions to which other class action plaintiffs are subject. The real advantages which would result from allowance of such claims would accrue to the benefit of plaintiff States. These plaintiffs would be permitted to bring class action suits without being subject to the limitations of ordinary Rule 23 class actions, and in addition would be afforded protection against an adverse decision in the determination of the proper plaintiff to represent various individual consumers in the class

> actions in the case of conflicting claims to representation. But the writers of the revised Rule 23 weighed the problems of manageability, fairness, and judicial economy in establishing the requirements therein, and the Court agrees with defendants that to allow a plaintiff State to recover damages for individual claimants in a substitute type of representative suit without the safeguards here provided would undermine the aims of that Rule.

Id.

See also California v. *Frito-Lay, Inc.*, 474 F.2d 774 (9th Cir. 1973) (California sought treble damages for its citizens against various snack food companies); *In re Motor Vehicle Air Pollution Control Equipment*, 52 F.R.D. 398 (C.D.Cal. 1970), *aff'd.* 481 F.2d 122 (9th Cir. 1973); *Land O'Lakes Creameries* v. *Louisiana St. Bd. of Health*, 160 F.Supp. 387 (E.D. La. 1958); Malina & Blechman, *Parens Patriae Suits for Treble Damages Under the Antitrust Laws*, 65 Nw. U. L. Rev. 193, 215-17 (1970).

We are not persuaded that these decisions are inapplicable merely because the plaintiffs are foreign governments suing on behalf of their nationals. Principles of comity, international law and existing United States treaties do not afford foreign sovereigns the right to press their citizens' claims in a manner barred to domestic states vis-a-vis their citizens. Reliance on authorities which sanction a sovereign's right to represent its citizens when their claim is against another sovereign who has not consented to suit in its own courts is misplaced. Foreign creditors are to be afforded legal access to our courts on the same basis as United States residents; practical difficulties notwithstanding, their status as foreigners does not entitle them to a more favorable remedy and procedures.[9] As the Supreme

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[9] The Treaty of Amity & Economic Relations between the United States and Iran, August 15, 1955, [1957] 8 U.S.T. 899, T.I.A.S. No. 3853, is not to the contrary. Article 3, paragraph 2, reads as

Court long ago observed in *New Hampshire* v. *Louisiana*, 108 U.S. 76, 90 (1883):

> There is no principle of international law which makes it the duty of one nation to assume the collection of the claims of its citizens against another nation, if the citizens themselves have ample means of redress without the intervention of their government. Indeed, Sir Robert Phillimore says, in his Commentaries on International law, vol. II., 2nd ed., page 12:
>
> "As a general rule, the proposition of Martens seems to be correct, that the foreigner can only claim to be put on the same footing as the native creditor of the State."

Furthermore, in our view the district court may have erred in holding that the Due Process Clause of the Fifth Amendment would not entitle the foreign nationals whose claims are sought to be enforced to notice and an opportunity to participate in or exclude themselves from the litigation. The United States Constitution does not bind foreign governments in their relationship with their nationals, of course, but when rights of nonresident aliens to property within the United States are adjudicated in United States courts, nonresident aliens may well be entitled to due process protection.[10] *See Guessefeldt* v. *Mc-*

follows in relevant part:

> Nationals and companies of either High Contracting Party shall have freedom of access to the courts of justice and administrative agencies within the territories of the other High Contracting Party, in all degrees of jurisdiction, both in defense and pursuit of their rights, to the end that prompt and impartial justice be done. Such access shall be allowed in any event, upon terms no less favorable than those applicable to nationals and companies of such other High Contracting Party or of any third country. . . .

This merely guarantees access to United States courts on the same terms available to United States nationals, not more favorable terms or additional remedies.

[10] In *Sardino* v. *Federal Reserve Bank*, 361 F.2d 106, 111 (2nd Cir. 1966), Judge Friendly wrote:

> The Government's second answer that "The Constitution of the United States confers no rights on non-resident aliens" is so patently erroneous in a case involving property in the United States that we are surprised it was made. Throughout our history the guarantees of the Constitution have been considered applicable to all actions of the Government within our borders—and even to some without. Cf. Reid v. Covert, 354 U.S. 1, 5, 8, 77 S.Ct. 1222, 1 L.Ed.2d 1148 (1957). This country's present economic position is due in no small part to European investors who placed their funds at risk in its development, rightly believing they were protected by constitutional guarantees; today, for other reasons, we are still eager to attract foreign funds. In Russian Volunteer Fleet v. United States, 282 U.S. 481, 489, 491-492, 51 S.Ct. 229, 75 L.Ed. 473 (1931), the Court squarely held that an alien friend is entitled to the protection of the Fifth Amendment's prohibition of taking without just compensation—even when his government was no longer recognized by this country. And the Court has declared unequivocally, with respect to non-resident aliens owning property within the United States, that they "as well as citizens are entitled to the protection of the Fifth Amendment."

Grath, 342 U.S. 308, 318 (1952); *United States* v. *Pink*, 315 U.S. 203, 228 (1942); *Russian Volunteer Fleet* v. *United States*, 282 U.S. 481, 489-92 (1931); *Sardino* v. *Federal Reserve Bank*, 361 F.2d 106, 111 (2nd Cir.) (Friendly, J.), *cert. denied* 385 U.S. 898 (1966).

We need not decide here, however, whether the Due Process Clause would of its own force prevent federal courts from permitting these antitrust claims to be compromised or collected in this instance without the consent of their owners. It is settled that when foreign governments invoke the benefits of United States courts to deal with tangible or intangible property located in this country, then their actions and decrees with respect to that property will be upheld only if consonant with the policy and law of the United States. *United States* v. *Pink*, 315 U.S. 203, 228-30 (1942); *Republic of Iraq* v. *First National City Bank*, 353 F.2d 47 (2nd Cir. 1965) (Frendly, J.), *cert. denied*, 382 U.S. 1027 (1966); *Restatement (Second), Foreign Relations Law of the United States*, § 43 (1965). The Supreme Court's emphasis in *Hawaii* on the preference for

class actions and its delineation in *Eisen* of the exacting requirements of notice under Rule 23 lead us to find that it would be inconsistent with the policy and law of the United Sates to permit the plaintiff governments to sue as *parens patriae* in this case. This is so even where, as in *Eisen,* the cost of a class action might be prohibitive and the claims are rendered practically unenforceable.

The remedy plaintiffs seek, if it can be made available at all, must come from Congress, who is best able to weigh its economic and political consequences and to consider alternative means of enforcing the antitrust laws of the United States. As Judge Medina observed in *Eisen*:

> [S]tatements about "disgorging" sums of money for which a defendant may be liable, or the "prophylactic" effect of making the wrongdoer suffer the pains of retribution and generally about providing a remedy for the ills of mankind, do little to solve specific legal problems. The result of this approach is almost always confusion of thought and irrational, emotional and unsound decisions. In cases involving claims of money damages all litigation presumes a desire on the part of the judicial establishment to make the wrongdoer pay for the wrongs he has committed, but to do this by applying settled or clearly stated principles of law, rather than by some process of divination. Punishment of wrongdoers is provided by law for criminal acts in statutes making it a crime punishable by fine or imprisonment to violate the antitrust laws. In certain civil suits punitive damages may be awarded; and in private antitrust cases the possible recovery of triple the loss actually suffered by a plaintiff is very properly praised as a supplementary deterrent. But none of these considerations justifies disregarding, nullifying or watering down any of the procedural safeguards established by the Constitution, or by congressional mandate, or by the Federal Rules of Civil Procedure, including amended Rule 23. It is a historical fact that procedural safeguards for the benefit of all litigants constitute some of the most important and salutary protections against oppressions, including oppressions by those whose intentions may be above reproach.

479 F.2d at 1013.

We note that the plaintiff governments did include a class action count in their complaints. Nothing in this opinion should be construed to prevent plaintiffs from representing their citizens within the confines of Rule 23 if the district court determines that the class should be certified under that rule.

The petition for writ of mandamus is denied. The order of the district court permitting the governments to proceed in their official representative or *parens patriae* capacities is reversed. The cause is remanded to the district court with directions to dismiss that count of plaintiffs' complaints for failure to state a proper claim for relief.

Appendix B

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Civ. 4-74 496

THE GOVERNMENT OF INDIA, *Plaintiff*,

—against—

PFIZER, INC., AMERICAN CYANAMID COMPANY, BRISTOL-MYERS COMPANY, OLIN CORPORATION, THE UPJOHN COMPANY, SQUIBB, INC., AND E. R. SQUIBB & SONS, INC.,
Defendants.

MISCELLANEOUS ORDER 74-40

Plaintiff in the above-captioned case has brought suit alleging itself to be the "parens patriae' and "official representative" of its nationals' claims (Complaint, paras. 11 and 12). This Court's previous order on this issue, *Miscellaneous Order 74-37*, entered in 4-71 Civ. 402 and 4-74 Civ. 65, is hereby adopted in this action and plaintiff's representative status is allowed.

The parties in open court (Pre-trial conference of October 22, 1974 at Tr. 108 and 130) consented to the Certification of this ruling to the Eighth Circuit Court of Appeals.

This Court is of the opinion that this order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from this order may materially advance the ultimate termination of this litigation.

IT IS SO ORDERED.

DATED: October 23, 1974.

/s/ MILES W. LORD
Miles W. Lord
United States District Judge

Appendix C

Miscellaneous Order No. 74-37

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION
4-71 Civ. 435

IN RE COORDINATED PRETRIAL PROCEEDINGS IN ANTIBIOTIC ANTITRUST ACTIONS

4-71 Civ. 402

THE REPUBLIC OF VIET-NAM, *Plaintiff*,

v.

PFIZER, INC., *et al.*, *Defendants.*

Civ. 4-74-65

THE IMPERIAL GOVERNMENT OF IRAN, *Plaintiff*,

v.

PFIZER, INC., *et al.*, *Defendants.*

Plaintiffs, the Imperial Government of Iran and the Republic of Viet-Nam, have brought suit to recover, *inter alia*, treble the damages said to have been suffered by individual citizens of these governments by reason of defendants' alleged violations of the antitrust laws. Clayton Act, Section 4, 15 U.S.C. § 15 (1970). Defendants have filed a motion to dismiss these claims on the ground that they may be asserted only by the individuals who have been damaged, or by a proper representative of those individuals in

a class action. The question before the Court is therefore whether a sovereign government has standing to assert, under Section 4 of the Clayton Act, claims for damage to individual citizens of that government. The Court concludes that it does and the motions to dismiss are denied.

Defendants' argument to the contrary hinges upon its reading of a line of cases to the effect that the several United States cannot bring suit to recover damages, under Section 4 of the Clayton Act, suffered by individual citizens of those States. *Hawaii* v. *Standard Oil Co.*, 405 U.S. 251, 260-266 (1972); *In re Multidistrict Vehicle Air Pollution M.D.L. No. 31*, 481 F.2d 122, 125-131 (9th Cir. 1973); *California* v. *Frito-Lay, Inc.*, 474 F.2d 774, 775-777 (9th Cir. 1973); *Philadelphia Housing Authority* v. *American Radiator and Standard Sanitary Corp.*, 309 F.Supp. 1057, 1061-1063 (E.D. Pa. 1969). From these cases defendants conclude that Section 4 of the Clayton Act does not create a cause of action in favor of a government seeking to recover trebled damages on behalf of its citizens.

Defendants' reading of these cases—particularly *Hawaii* v. *Standard Oil*—is open to some question.[1] Regardless of that, however, it is difficult to see their application to the cases at hand. Defendants do not, at least for purposes of the instant motion, dispute that individual citizens of Iran and Viet-Nam may sue under Section 4 of the Clayton Act to recover damages for violation of the antitrust laws. The sole question at issue now is whether their governments may assert those causes of action on their behalf, absent formal assignment of the causes of action or an act of expropriation.

---

[1] The Court in *Hawaii* viewed the question it was deciding as whether Section 4 of the Clayton Act allowed Hawaii to "recover damages for injury *to its general economy*," 405 U.S. at 264 (emphasis supplied), not damages for injury to individual citizens of the State.

Concededly none of the United States could do so on behalf of its citizens under the cases relied upon by defendants. There is at least a suggestion of this in *Hawaii* v. *Standard Oil*, see 405 U.S. at 255, 265-266, and such is the holding of *California* v. *Frito-Lay* and *Philadelphia Housing Authority*. It is, indeed, questionable whether under the Supremacy Clause of the Constitution alone a State could appropriate to itself, however beneficial the ultimate use, its citizens' rights to recover damages under federal law. Allowing a State to sue for damages on behalf of individual citizens, without their consent, could either subject the defendant to multiple damage claims (when the identical claims were brought by the individuals injured) or, if the State's assertion of those claims were held to bar their assertion by the individuals damaged, amount to a taking of their property without due process of law. And it was the fear of doubled damages or deprivation of the injured individuals' rights that caused the Courts, in the cases relied upon by defendants, to deny the causes of action asserted. *Hawaii* v. *Standard Oil*, 405 U.S. at 263-264; *In re Multidistrict Vehicle Air Pollution*, 481 F.2d at 131 (relying solely on *Frito-Lay*); *California* v. *Frito-Lay*, 474 F.2d at 777-778; *Philadelphia Housing Authority* v. *American Radiator*, 309 F. Supp. at 1061-1062.

Unlike the relationships between a State and its citizens, however, the relationship between a foreign government and *its* citizens is not restricted by the Constitution of the United States. It would be startling, at least, to conclude that foreign application of the antitrust laws was intended by Congress to be limited to those countries where notions of property and relationships between the individual and his government were substantially similar to those prevailing in the United States. In the present cases, the Governments of Iran and of Viet-Nam have asserted that they have the right, under their law, to take claims of this kind from their citizens, litigate those claims, and apply any proceeds from the litigation to the benefit of their

citizens as a whole. Defendants, so far as can be determined, do not take issue with that assertion; they merely argue that it is irrelevant. But since the consequences of such a taking are that the claims may no longer be asserted by the individuals themselves, the defendants need no longer fear a double recovery. And since constitutional restrictions upon such takings by State governments do not apply to foreign governments, the reasons for denying States the power to bring such lawsuits do not apply to the case at hand. The motion to dismiss is therefore denied.
Dated: June 17, 1974

MILES W. LORD
United States District Judge

Appendix D

SUPREME COURT OF THE UNITED STATES

No. A-443

GOVERNMENT OF INDIA, *Petitioner*

v.

PFIZER, INC., ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including January 9, 1976.

/s/ HARRY A. BLACKMUN
Harry A. Blackmun
Associate Justice of the Supreme Court of the United States

Dated this 13th day of November, 1975.

Appendix E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

IN RE COORDINATED PRETRIAL PROCEEDINGS
IN ANTIBIOTIC ANTITRUST ACTIONS

THE GOVERNMENT OF INDIA, *Plaintiff*,

v.

PFIZER, INC., AMERICAN CYANAMID COMPANY, BRISTOL-MYERS COMPANY, OLIN CORPORATION, THE UPJOHN COMPANY, SQUIBB, INC., AND E. R. SQUIBB AND SONS, INC.,
Defendants.

No. Civ. 4-74-496

JURY TRIAL DEMANDED
COMPLAINT

Plaintiff, the Government of India, appearing herein by its attorneys, brings this Complaint against Pfizer, Inc., American Cyanamid Company, Bristol-Myers Company, Olin Corporation, The Upjohn Company, Squibb, Inc., and E. R. Squibb and Sons, Inc.

I
Jurisdiction and Venue

1. The jurisdiction of this Court to hear this Complaint is based upon the original jurisdiction of the Court to hear "any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraint and monopolies," and, as hereinafter set forth, this controversy involves Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2); Act of July 2, 1890, Ch. 647, §§ 1 and 2, 26 Stat. 209, as amended;

Sections 1, 4, 5, 7, 12 and 16 of the Clayton Act (15 U.S.C. §§ 12, 15, 16, 18, 22 and 26), Act of October 15, 1914, Ch. 323, §§ 1, 4, 5, 12 and 16, 38 Stat. 730, 731, 736 and 737, as amended; and rules and laws against fraud and deceit. Plaintiff sues for treble damages, plus costs of suit and reasonable attorney's fees.

2. Each Defendant maintains an office, transacts business, is found, or has an agent within this district.

II
Plaintiff

3. Plaintiff, The Government of India (hereinafter GOI), is a sovereign foreign state with whom the United States of America maintains diplomatic relations.

4. Plaintiff, and Plaintiff's departments, agencies, commissions, institutions, instrumentalities and subdivisions, has purchased, directly and indirectly, substantial amounts of broad spectrum antibiotics and broad spectrum antibiotic products during the period in suit in transactions arising out of the foreign and/or interstate commerce of the United States of America.

III
Capacities in Which Plaintiff Sues

5. Plaintiff, on its own behalf and on behalf of its departments, agencies, commissions, institutions, instrumentalities and subdivisions, maintains this action as a direct and indirect purchaser of broad spectrum antibiotics and broad spectrum antibiotic products (hereinafter BSA and BSAP).

6. Plaintiff maintains this action as the representative of a class consisting of political subdivisions in India which purchased BSA and BSAP.

7. Plaintiff maintains this action as the representative of a class consisting of individual purchasers and con-

sumers in India who purchased and consumed BSA and BSAP.

8. Plaintiff maintains this action as the representative of a class consisting of hospitals and clinics in India which purchased BSA and BSAP.

9. Plaintiff maintains this action as the representative of a class consisting of retailers and wholesalers in India who purchased BSA and BSAP.

10. Plaintiff maintains this action, in a *parens patriae* and proprietary capacity, for damages to its proprietary, commercial and business interests, including loss of foreign exchange, arising from purchases of BSA and BSAP.

11. Plaintiff maintains this action, in a *parens patriae* capacity, for direct out-of-pocket damages suffered by political subdivisions, individuals, hospitals, clinics, retailers, wholesalers and importers in India who purchased BSA and BSAP.

12. Plaintiff maintains this action, in a capacity as official representative of citizens, businesses, institutions and organizations in India, for direct out-of-pocket damages suffered by such citizens, businesses, institutions and organizations due to purchases of BSA and BSAP.

13. Each of the above-mentioned classes is so numerous that joinder of all members is impracticable. There are questions of law and fact common to each class. The claims of the GOI, as the representative of each class, are typical of the claims of each class. And the GOI will fairly and adequately represent each class.

14. This action will be dispositive of the interests of the members of the above-mentioned classes.

15. The questions of law and fact common to the members of each class predominate over questions involving only individual members, and a class action is superior to other available methods for the fair and efficient resolution of the controversy.

• • •

Appendix F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

IN RE COORDINATED PRETRIAL PROCEEDINGS
IN ANTIBIOTIC ANTITRUST ACTIONS

THE REPUBLIC OF THE PHILIPPINES BY AND THROUGH THE CENTRAL BANK OF THE PHILIPPINES, *Plaintiff*,

v.

PFIZER, INC., ET AL., *Defendants*.

No. 4-71 Civ. 435

No. 4-72 Civ. 312

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR RECOGNITION OF A PRIVATE-HOSPITAL CLASS IN THE PHILIPPINES

This memorandum is submitted on behalf of all defendants in opposition to the motion of plaintiff, The Republic of the Philippines, for recognition under Rule 23 of the Federal Rules of Civil Procedure of a class of private hospitals in the Philippines. The bases for defendants' opposition to plaintiff's motion are (1) that certification of the class would be premature while a motion to transfer under 28 U.S.C. § 1404(a) is pending and until defendants have had an opportunity for class-action discovery; (2) that a foreign sovereign state and private hospitals are so different in character, in their methods of purchase, and in respect of the defenses to which they will be subject that the former cannot be a proper representative of the latter; and (3) that plaintiff has failed to demonstrate that the

criteria for certification of a class set forth in Rule 23 of he Federal Rules of Civil Procedure have been met.*

• • •

II. A Foreign Sovereign Cannot Be A Proper Class Representative For A Class of Private Hospitals.

Although discovery would be necessary for full consideration of all issues arising out of plaintiff's motion, even without developing additional facts, it is clear that there are inherent objections to a foreign sovereign's acting as a class representative of foreign private hospitals.

The fact situation and important legal issues in this case differ substantially from the domestic antibiotic antitrust actions, making it inappropriate here to rely on earlier opinions of this Court certifying classes in which a domestic governmental unit was a class representative. Plaintiff's attempt to compare its capacity as a class representative to that of domestic governmental entities is deceiving because the Philippines' own claims and the applicable defenses are not typical of those relating to the alleged class.* For example, defendants have raised and will continue to pursue the standing defense as it applies to foreign government plaintiffs. The issue of standing as applied to foreign hospitals involves very different considerations. Defendants will also demonstrate that the Philippines, as a sovereign nation, had broad power, through a variety of regulatory means,* to prevent any alleged damage which it might have incurred through defendants' acts.

The applicable rule of law was stated in *Koos* v. *First*

---

* Moreover, no domestic *governmental* entity sought to represent a class of *private* hospitals.

* Such regulatory means include price control laws, tariffs, manufacturing licenses, foreign exchange controls, etc., which plaintiff in fact used to control many aspects of commerce relating to BSA during the alleged damage period.

National Bank of Peoria, 496 F.2d 1162, 1164-65 (7th Cir. 1974);

> Where it is predictable that a major focus of the litigation will be on an arguable defense unique to the named plaintiff or a small subclass, then the named plaintiff is not a proper class representative . . .
>
> Had this case proceeded as a class action, much of the Kooses' efforts would have necessarily been devoted to their own problems posed by the Section 4(b) defense; this may well have resulted in less attention to the issue which would be controlling for the rest of the class. A representative plaintiff should not be permitted to impose such a disadventure on the class.

In our case the claims as well as the defenses of the Philippines are so different from those of the private hospitals that one would have to anticipate the same diversion of attention from controlling issues the court would not permit in *Koos*. Unlike domestic cases in which state governments represented *public* hospital classes, plaintiff did not buy BSAs in the same market as the class members. Plaintiff cannot dispute that the government market in the Philippines is totally different from the private market in method of sale, pricing, chain of distribution, and in other respects.

Moreover, while the plaintiff seeks damages for overpayments for BSA products both for itself and in behalf of the class of government hospitals, it also alleges in Paragraph 76(b) of the Amended Complaint that it was injured by being deprived of vital foreign exchange reserves. Not only in this claim for loss of foreign exchange reserve unique to the Government, but also it is a novel type of antitrust claim that will require separate proof and separate legal analysis apart from the common claim relating to purchase of BSAs.

• • •

Supreme Court, U. S.
FILED
FEB 9 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1975

Nos. 75-975 and 75-976

No. 75-975

GOVERNMENT OF INDIA,

Petitioner,

-against-

PFIZER INC., AMERICAN CYANAMID COMPANY, BRISTOL-MYERS COMPANY, SQUIBB CORPORATION, OLIN CORPORATION, and THE UPJOHN COMPANY.

Respondents.

No. 75-976

IMPERIAL GOVERNMENT OF IRAN,

Petitioner,

-against-

PFIZER INC., AMERICAN CYANAMID COMPANY, BRISTOL-MYERS COMPANY, SQUIBB CORPORATION, OLIN CORPORATION, and THE UPJOHN COMPANY.

Respondents.

On Petition For a Writ of Certiorari to
The United States Court of Appeals
For the Eighth Circuit

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IN THE

Supreme Court of the United States

October Term, 1975

Nos. 75-975 and 75-976

No. 75-975

GOVERNMENT OF INDIA,

Petitioner,

-against-

PFIZER INC., ET AL.

Respondents.

No. 75-976

IMPERIAL GOVERNMENT OF IRAN,

Petitioner,

-against-

PFIZER INC., ET AL.

Respondents.

JOINT BRIEF FOR RESPONDENTS IN OPPOSITION

This brief is filed pursuant to Supreme Court Rule 24 in opposition to the petitions for writs of certiorari of the Governments of India (hereinafter "India") and Iran (hereinafter "Iran").[1]

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[1]Iran has adopted the Petition of India (Iran Petition, p. 2); therefore, statements in the India petition will be referred to from time to time as those of "petitioners."

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 522 F.2d 612 and appears as Appendix A to the India petition. The orders of the District Court are unreported, but they appear as Appendices B and C to the India petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petitions, except that the judgment of the Court of Appeals was entered on September 22, 1975, not on August 27, 1975.

QUESTION PRESENTED

The legal issue sought to be reviewed is:

> Whether the Eighth Circuit was correct in ruling that a foreign government may not maintain an antitrust treble-damage action under Section 4 of the Clayton Act as *parens patriae* or "official representative" of its corporate or individual citizens?

Petitioners' statement of the issue is misleading because it is qualified with assertions of fact which are not based on the record and not necessary to resolution of the issue properly presented.

STATUTES AND RULES INVOLVED

Section 4 of the Clayton Act (38 Stat. 731; 15 U.S.C. § 15) and Rule 23 of the Federal Rules of Civil Procedure, the texts of which may be found in Appendix A hereto, are the primary statute and rule involved in this matter.

STATEMENT[2]

Petitioners are two of nine foreign governments that have filed actions against these respondents claiming treble damages under Section 4 of the Clayton Act (15 U.S.C. § 15) for alleged violations of the antitrust laws of the United States. Seven of those cases, including those of the two petitioners, are still pending with a number of other cases in the District of Minnesota in coordinated proceedings under 28 U.S.C. § 1407.[3]

Each of the plaintiff foreign governments has alleged that it was injured by respondents' violations of the American antitrust laws, and these petitioners also seek to assert as *parens patriae* or "official representative" all claims the many millions of their individual and corporate citizens may have. Their complaints relate to the subject matter of the case with which this Court dealt in *United States v. Chas. Pfizer & Co.*, 404 U.S. 548 (1972), and are similar to the complaints in more than one hundred fifty other treble-

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[2]Respondents take issue with Petitioner India's "Background Statement" (India Petition, pp. 8-11) containing numerous statements not of record and of questionable accuracy. For example, there is no record support for statements concerning foreign exchange control and other legislation or regulation by the Government of India.

[3]Actions by the State of Kuwait and the Government of Spain have been dismissed. The other cases brought by foreign governments are now pending before the Honorable Miles W. Lord in the District of Minnesota for consolidated pre-trial or for trial: The Republic of Viet-Nam v. Pfizer, Inc., Civil No. 4-71 Civ. 402 (D. Minn., filed Feb. 2, 1970); The Republic of Philippines v. Pfizer, Inc., Civil No. 4-72 Civ. 312 (D. Minn., filed Apr. 4, 1972); The Imperial Government of Iran v. Pfizer, Inc., Civil No. 7-74 Civ. 65 (D. Minn., filed Feb. 3, 1974); The Government of India v. Pfizer, Inc., Civil No. 4-74 Civ. 496 (D. Minn., filed Oct. 11, 1974); The Federal Republic of Germany v. Pfizer, Inc., Civil No. 4-74 Civ. 614 (D. Minn., filed Nov. 29, 1974); The Government of Colombia v. Pfizer, Inc., Civil No. 4-76-47 (D. Minn., filed Nov. 29, 1974); The Republic of Korea v. Pfizer, Inc., Civil No. 4-76-48 (D. Minn., filed Nov. 29, 1974).

damage actions, most of which were brought as class actions, against these respondents.[4]

The claims of the foreign sovereigns in these actions appear to be the first in the history of the American antitrust laws.[5] Respondents have taken the position in all of the actions that foreign sovereigns do not have standing to sue as "persons" under Section 4 of the Clayton Act and may not assert antitrust claims in a *parens patriae* or representative capacity. The District Court has ruled in favor of the foreign sovereigns on both issues.[6]

[4]The history and background of the antibiotic antitrust litigation, which followed Federal Trade Commission and Justice Department proceedings, has been summarized in Pfizer Inc. v. Honorable Miles W. Lord, 456 F.2d 532 (8th Cir.), *cert. denied*, 406 U.S. 976 (1972), and West Virginia v. Chas. Pfizer & Co., 314 F. Supp. 710 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2nd Cir.), *cert. denied*, 404 U.S. 871 (1971).

See also American Cyanamid Co. v. FTC, 363 F.2d 757 (6th Cir. 1966); Chas. Pfizer & Co. v. FTC, 401 F.2d 574 (6th Cir. 1968), *cert. denied*, 394 U.S. 920 (1969); United States v. Chas. Pfizer & Co., 426 F.2d 32 (2d Cir. 1970), *aff'd by an equally divided Court*, 404 U.S. 548 (1972), *on remand*, 367 F. Supp. 91 (S.D.N.Y. 1973); North Carolina v. Chas. Pfizer & Co., 384 F. Supp. 265 (E.D.N.C. 1974), *aff'd* 1975-2 Trade Cases ¶ 60,663 (4th Cir. Jan. 12, 1976).

[5]The Government of India was named as a plaintiff along with a government-owned corporation similar to our T.V.A. and a number of government-owned public utilities in a group of cases that were part of the electrical equipment antitrust litigation. E.D. Pa. Civil Action Nos. 30965, 30967, 30971, 30973, and 30974. It is not clear whether India itself actually asserted claims. Nor is it clear whether the court's rulings in 1963 with respect to standing applied to the government or only to the government-owned corporations. The cases were not tried or officially reported.

[6]On September 18, 1969 the State of Kuwait filed an action against these respondents. On February 18, 1971, respondents moved to dismiss Kuwait's complaint on the ground that a foreign nation is not a "person" within the meaning of Section 4 of the Clayton Act and, therefore, lacked standing to sue. Judge Lord, sitting by designation in the Southern District of New York at that time, denied the motion in May 1971 and certified the question for interlocutory appeal under 28 U.S.C. § 1292(b). In Re Antibiotic Antitrust Actions; State of Kuwait v. Chas Pfizer & Co., et al., 333 F. Supp. 315 (S.D.N.Y. 1971). Judge Lord in denying the motion stated that his decision applied with equal force and effect to the then pending complaint of Vietnam. The Court of Appeals for the Second Circuit granted leave to appeal, but before the matter was briefed or argued, the Kuwait case was dismissed by stipulation.

Recognizing the importance of deciding the threshold issue of standing before the secondary question of whether the suits can be maintained in a *parens patriae* or representative capacity, respondents sought interlocutory appellate review of both issues under 28 U.S.C. § 1292(b). Petitioners acquiesced in certification of the secondary question for interlocutory appeal but objected to certification of the primary issue.[7] The District Court certified the *parens-patriae*/representative-capacity question but refused to certify the basic standing question at that time.

In April 1972, the Republic of the Philippines filed its suit. Respondents' responsive pleadings alleged the affirmative defense of lack of standing to sue under Section 4 of the Clayton Act. The Philippines moved to strike the defense. The motion was argued in November 1972 and all parties at that time agreed that the decision should again be certified for appeal. The matter was not decided until January 16, 1974, at which time the District Court directed that the affirmative defenses be stricken but did not certify the issue for interlocutory appeal.

On January 12, 1974, the Republic of Vietnam moved for leave to amend its complaint to assert claims of its citizens in a *parens patriae* capacity. The Imperial Government of Iran filed a complaint on February 6, 1974, that also asserted claims in a *parens patriae* capacity. When Vietnam was granted leave to amend, respondents immediately moved in March 1974 to dismiss the *parens patriae* claims of both Iran and Vietnam on the ground that such claims could be asserted only by the individuals to whom they belonged or in a proper class action. On June 17, 1974, Judge Lord denied respondents' motion to dismiss, holding that foreign governments, unlike the United States or any of the states of the union, may sue to recover "treble the damages said to have been suffered by individual citizens of these governments". (Appendix C to India Petition).

On October 15, 1974, India sued respondents, asserting not only its own alleged damages but also a claim for damages to its nationals based on *parens patriae* and "official representation." Two days later, respondents moved the District Court for an order dismissing the complaint on the ground that India lacked standing to sue for treble damages under Section 4 of the Clayton Act and dismissing the portions of the complaint claiming damages as *parens patriae* and as an "official representative." Judge Lord deferred ruling on the "person" issue, but decided that India, like Iran and Vietnam, could sue in a *parens patriae* or "official representative" capacity.

[7]See "Joint Appendix", p. 92a to the "Joint Brief for Petitioners-Appellants" filed with the Eighth Circuit and part of the record here (hereinafter referred to as "Joint Appendix"); Joint Appendix, p. 98a; Joint Appendix, p. 115a.

Respondents petitioned the Court of Appeals for a writ of mandamus to review the District Court's ruling on the standing issue in a further effort to have that primary issue resolved before, or together with, the *parens patriae* issue. Although the court consolidated the interlocutory appeal with the mandamus petition, it declined to issue the writ, holding that the District Court's ruling on that question did "not constitute a clear abuse of discretion"; thus it did not reach the legal question of standing, expressly stating that it "intimate[d] no view on the merits [of that issue.]" 522 F.2d at 615. On the certified interlocutory appeal, the Court of Appeals reversed the District Court, holding that foreign sovereigns cannot sue under the antitrust laws as *parens patriae* or in a representative capacity. It is this latter ruling which petitioners seek to bring here for review.

On December 27, 1975, shortly before this petition was filed, the District Court, reversing its previous position, did certify for interlocutory appeal its ruling on the basic standing or "person" issue. Respondents' application for permission to appeal having been granted on January 22, 1976, that issue is *now* pending in the Court of Appeals for a decision on its merits.[8]

Thus, petitioners, who have consistently opposed appellate review of the fundamental issue of their standing to sue under the Clayton Act, are seeking review of the subsidiary issue of their ability to claim in the additional capacity of *parens patriae* or "official representative" while the underlying question is still pending before the Court of Appeals.

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[8]A copy of the order of the Court of Appeals in docket number 76-1064 is attached hereto as Appendix B. The "person" issue was certified in two other foreign government cases — the Philippines and Vietnam cases — in addition to petitioners' cases.

REASONS THE WRIT SHOULD NOT BE GRANTED

The issue raised by petitioners does not warrant review by this Court on certiorari. (1) The issue of whether foreign sovereigns can sue under the antitrust laws as *parens patriae* or in a representative capacity should not be decided until the basic question of whether foreign sovereigns have standing to sue in *any* capacity under those laws is resolved. Without a resolution of that question, there is no basis for petitioners' assertion that the decision of the Court of Appeals on the *parens patriae* or representative capacity issue is of any consequence to administration of the American antitrust laws, to American foreign economic relations, or to issues implicating the sovereignty of nations. (2) The decision of the Eighth Circuit is correct. (3) There is no conflict in the decisions on the issues raised by petitioners.

I.

THE QUESTION WHETHER FOREIGN SOVEREIGNS CAN SUE UNDER THE ANTITRUST LAWS AS *PARENS PATRIAE* OR AS "OFFICIAL REPRESENTATIVES" SHOULD NOT BE DECIDED BEFORE THE BASIC QUESTIONS OF THE STANDING OF FOREIGN SOVEREIGNS TO SUE IN ANY CAPACITY UNDER THOSE LAWS IS RESOLVED.

The antitrust complaints of these petitioners present two questions regarding their capacity to maintain these actions. *First*, the basic question of whether a foreign sovereign is a "person" within the meaning of Section 4 of the Clayton Act (15 U.S.C. § 15) with standing to sue in *any* capacity under the American antitrust laws. *Second*, the subsidiary question of whether, if a foreign government does have standing to sue under the antitrust laws, it can sue as *parens patriae*

or as "official representative" for injuries allegedly suffered by its citizens who themselves are entitled to sue directly.

Petitioners are asking this Court, as they asked the Court of Appeals, to deviate from a logical sequence of decision and resolve the subsidiary issue before deciding the primary question. In effect, they are not only asking for resolution of a legal issue that may be academic, but also seeking to have the Court approach resolution of that secondary issue —whether a foreign government can sue as *parens patriae*— without benefit of a prior analysis of the bases, if any, in policy and law, upon which a foreign sovereign can sue at all.

The District Court's holding that a foreign sovereign has standing to sue in any capacity under the antitrust laws presents serious questions of law and policy which, when eventually resolved, may make academic the further question whether a foreign sovereign can sue as *parens patriae* or in a representative capacity. Now that the basic standing issue is before the Court of Appeals for the Eighth Circuit on interlocutory appeal certified under 28 U.S.C. § 1292(b), that court can review the merits of the District Court's holding, which it had declined to do when the question was before it on petition for a writ of mandamus.

When the standing question is presented to this Court for review, it will turn upon the correct interpretation to be placed on § 4 of the Clayton Act, which limits damage actions to

> Any *person* who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . (emphasis added).

Since the United States has been held by this Court not to be a "person" within the meaning of that section, *United*

States v. Cooper Corp., 312 U.S. 600 (1941), it seems anomalous to suppose that Congress had given foreign sovereigns rights under the antitrust laws it denied to our own government. Even when Congress amended the Clayton Act fourteen years after the *Cooper* decision to give the United States a damage remedy, it permitted only single damages (15 U.S.C. § 15a), not the treble damages petitioners are claiming here.

While this Court did hold that the states of the union are "persons" under the Clayton Act, *Georgia v. Evans*, 316 U.S. 159 (1942), it distinguished a state from the United States on the grounds that (1) it was inconceivable Congress intended to deny states the right to sue and (2) states, unlike the United States, are not in a position to protect themselves fully against antitrust violations without recourse to treble damage actions.

Foreign governments, unlike the states of the union, *are* in a position to protect themselves fully against antitrust violations. In fact, they can exercise unlimited power to regulate business, control the grant and enforcement of patents, control prices and profits, subsidize or protect local competitors, and impose taxes and duties, and can also confiscate, exclude, nationalize, or close their borders to, American businesses.

While it may be inconceivable to suppose that Congress would not have given the several states a right to sue for treble damages under the antitrust laws, it is not difficult to conceive of strong reasons why Congress might withhold that right from foreign sovereigns. In fact, it is difficult to imagine why Congress would have given a remedy to foreign sovereigns while denying it to the United States or why it would have conferred the generous remedy of treble dam-

ages on foreign sovereigns unilaterally, thereby impairing the ability of our government to negotiate treaties with foreign nations requiring them to confer reciprocal rights on the United States.[9]

The Court should not undertake to resolve the question whether foreign sovereigns can sue as *parens patriae* or in a representative capacity before it has decided whether they can sue at all.

Analysis of petitioners' arguments demonstrates how interwoven the policy and legal issues underlying the two questions are and, indeed, how often those very arguments undercut petitioners' position on the basic standing issue—a fact that may explain why petitioners have resisted appellate review of both issues at one time.

For example, petitioners argue that because the responsibilities of a foreign sovereign to its citizens differ greatly from those of a state to its citizens, it is more appropriate to look for analogy to the rules of standing applied to our federal government than to those applicable to our state governments.[10] Whatever support that argument gives to petitioners' effort to avoid application to them of this Court's recent holding that states cannot sue as *parens patriae*,[11] it gives even greater support to respondents' view

[9]Nothing is found in the legislative history which suggests that foreign governments were to be given the right to bring suit. In debates centering around what later became Section 7 of the Sherman Act, Senators Hoar and Sherman discussed the purpose of that proposal. These remarks are of particular significance since Senator Hoar was to become the primary draftsman of the Sherman Act in its final form. United States v. Cooper Corp., *supra*, 312 U.S. at 612. In response to a question by Senator Hoar, Senator Sherman stated:

> MR. SHERMAN . . . but the second section provides purely a personal remedy, a civil suit also by *citizens of the United States*. 21 CONG. REC. 2564 (1890) (emphasis added).

[10]India Petition, p. 18.

[11]Hawaii v. Standard Oil Co., 405 U.S. 251 (1972).

that foreign sovereigns are not "persons" (just as the United States government is not a "person") with standing to sue under Section 4 of the Clayton Act.

Similarly, the argument underlying petitioners' scarcely veiled threats that, unless foreign governments have a right to sue as *parens patriae* for antitrust violations, they may consider "less desirable" means to protect their national interests, may not approach their debt burdens to the United States with the "good grace" shown in the past, may subject American enterprise "to political reactions in host countries," and may reject American efforts to encourage them to undertake their own antitrust initiatives,[12] more strongly supports the conclusion that foreign sovereigns should be denied standing to sue under the antitrust laws in *any* capacity than the suggestion that they be allowed to sue as *parens patriae*. While one might hope, as petitioners' counsel hope, that the grant to foreign governments of a right to sue as *parens patriae* would inspire reciprocal fairness to America and American businesses and respect by foreign governments for antitrust principles, that hope can never reach the level of assurance unless the right to sue is granted through legislative and diplomatic channels with provision for reciprocal agreements in exchange for the rights conferred. As the Court of Appeals stated:

> The remedy plaintiffs seek, if it can be made available at all, must come from Congress, who is best able to weigh its economic and political consequences and to consider alternative means of enforcing the antitrust laws of the United States. 522 F.2d at 620.

Petitioners' argument that foreign nations must have a right to sue as *parens patriae* lest socialist governments be

[12]India Petition, pp. 12, 15, 16.

favored over those with free and mixed economies[13] is an equally strong argument for denying foreign governments standing to sue under the antitrust laws at all. Denial of standing to foreign governments to sue under our antitrust laws would eliminate any discrimination in favor of or against socialist states. Individuals and private corporations in those foreign nations with free or mixed economies would continue to have the right to sue under our antitrust laws and continue to be subject to those laws. Foreign sovereigns, on the other hand, which have thus far enjoyed immunity from our antitrust laws, would not be placed in the favored position of enjoying the benefits of our antitrust laws without being subject to their restrictions.[14] Unless whatever rights a foreign sovereign is to have to maintain an action under our antitrust laws as *parens patriae* are specifically granted *and qualified* by Congress, we will find such foreign governments as petitioner Iran, an active participant in the OPEC cartel, asserting in our courts rights broader than those enjoyed by any other class of antitrust claimant and, at the same time, asserting an absolute immunity from claims or counterclaims for injury our citizens have suffered as a result of their own acts in restraint of trade—acts which, unlike those of our own

[13]India Petition, p. 18.

[14]Recent case law has observed the unique position of foreign governments to regulate, even arbitrarily, their economic affairs with no responsibility under American laws. For example, certain seemingly arbitrary policies of the Venezuelan government in its dealings with petroleum exporters were immunized from antitrust scrutiny in the recent case of Interamerican Refining Corp. v. Texaco Maracaibo, Inc., 307 F. Supp. 1291 (D. Del. 1970). In Occidental Petroleum Corp. v. Buttes Gas & Oil Co., 331 F. Supp. 92 (C.D. Cal. 1971), *aff'd*, 461 F.2d 1261 (9th Cir.), *cert. denied*, 409 U.S. 950 (1972), the actions of the Persian Gulf sheikdom of Sharjah together with the government of Iran, in seizing the off-shore drilling concessions granted by the sheikdom of Umm al Quaywayn, were likewise held to be beyond the jurisdiction of the antitrust laws.

federal and state governments, are not subject even to constitutional limitation.

Of all of the arguments petitioners make in support of their position that they should be entitled to sue as *parens patriae*, perhaps the one that cuts most strongly against them on the basic issue of their standing to sue in any capacity is their recurring theme of "affront to the sovereign". They argue that once a foreign nation is in court as a claimant for injury to its business or property, it is an affront to the sovereignty of that nation to question the validity or fairness of its appropriation of other claims its citizens might have, its assertion of a legal obligation to sue on behalf of its citizens, the adequacy of representation it will give to its citizens, the fairness of the manner in which it would distribute any recovery to those of its citizens it is representing, and perhaps even the *res judicata* effect of the *parens patriae* recovery on subsequent individual claims by its citizens.[15] If, indeed, it is an affront to sovereignty for our courts to ask a foreign-government plaintiff to observe the same standards of fairness and due process imposed on other antitrust claimants, it is better that those foreign sovereigns not be in our courts asserting antitrust claims until Congress or our diplomats have resolved those potential affronts.

Petitioners may argue that, although it might be better to resolve both the "person" and the *parens patriae* issues together, failure to grant certiorari now on the *parens patriae* issue would preclude review of that issue later if this Court were to grant certiorari with respect to the decision the Court of Appeals will render on the "person" issue in the pending interlocutory appeal. That is a possibility of which petition-

[15]India Petition, pp. 21, 23, 26, 27.

ers presumably were aware when they opposed all efforts to have both issues resolved together. However, even if this potential problem had not been one of their own making, it would be no justification for asking this Court to depart from a logical order of decision-making, to devote its time to deciding issues that may be academic, and to deal with a secondary issue before the primary issue is resolved and before the policy and legal premises on which that resolution depends are defined.

II.

THE DECISION BELOW IS CORRECT.

The decision of the Court of Appeals holding that petitioners may not sue in a *parens patriae* or "official representative" capacity is consistent with controlling precedent and is supported by principles of international law.[16]

The Court of Appeals based its decision on three primary principles.

First, it recognized that as a general rule the right of a government to sue as *parens patriae* for the general welfare of its citizens at large is limited to suits "to prevent or

[16]The specific holding of the Court of Appeals was stated as follows:

> We reverse, and hold that the plaintiff governments may not sue on behalf of their citizens' antitrust damage claims as parens patriae. A parens patriae action cannot be brought to collect the damage claim of one legally entitled to sue in his own right. The mere fact that the claimant or creditor is a foreign national does not afford him or his government access to judicial procedures barred to domestic creditors. Finally, we are unable to dismiss so easily as did the district court the due process implications of the procedure plaintiffs ask us to approve. In our view, plaintiffs may represent their citizens' damage claims only if they can do so within a Rule 23 class action. 522 F.2d at 616.

repair harm to its 'quasi-sovereign' interests,"[17] and that quasi-sovereign interests have been defined by this Court as "interest[s] apart from [those] of particular individuals who may be affected,"[18] and are different from the sovereign's proprietary interests. The court concluded that the interests relied on by the foreign government plaintiffs are clearly not of this type and therefore dismissed the *parens patriae* or "official representative" claims under the authority of *Hawaii v. Standard Oil Co., supra.*[19]

Second, the Court of Appeals reasoned that this Court has expressed a preference for class actions as opposed to *parens patriae* actions as a means of bringing representative suits under the antitrust laws, *Hawaii v. Standard Oil Co.*, 405 U.S. at 265-66, and that petitioners' status as foreign sovereigns does not justify deviation from that preference or require relaxation of the protective limitations of Rule 23, Fed. R. Civ. P. The Court said:

[17]Hawaii v. Standard Oil Co., *supra*. Other cases relied on by the Court of Appeals as authority for the general rule that states cannot maintain antitrust actions as *parens patriae* include: In Re Multidistrict Vehicle Air Pollution, 481 F.2d 122 (9th Cir.), *cert. denied*, 414 U.S. 1045 (1973); California v. Frito-Lay, Inc., 474 F.2d 774 (9th Cir.), *cert. denied*, 412 U.S. 908 (1973); Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp., 309 F. Supp. 1057 (E.D. Pa. 1969), *aff'd sub nom.* Mangano v. American Radiator & Standard Sanitary Corp., 438 F.2d 1187 (3d Cir. 1971).

[18]Georgia v. Pennsylvania R.R., 324 U.S. 439, 451 (1945).

[19]Petitioners have attempted to create some distinction between their claims "as *parens patriae*" and their claims under a doctrine they call "official representative." The need for such a distinction derives from their apparent recognition that the *parens patriae* doctrine as set forth in many decisions by this Court and lower courts cannot embrace petitioners' claim (India Petition, pp. 10-11: "But *parens patriae* jurisdiction has had limited application in practice"). Thus they set forth a new theory entitled "official representative," for which they can cite no legal precedent and for which there is in fact no legal support. No matter what terminology is employed, however, petitioners seek damages for alleged injury to the business and property of an unidentified group of their citizens without undertaking to provide any of the safeguards for the absent claimants *or* for respondents that are required by Rule 23 of the Federal Rules of Civil Procedure.

> Principles of comity, international law and existing United States treaties do not afford foreign sovereigns the right to press their citizens' claims in a manner barred to domestic states vis-a-vis their citizens. Reliance on authorities which sanction a sovereign's right to represent its citizens when their claim is against another sovereign who had not consented to suit in its own courts is misplaced. Foreign creditors are to be afforded legal access to our courts on the same basis as United States residents; practical difficulties notwithstanding, their status as foreigners does not entitle them to a more favorable remedy and procedures. 522 F.2d at 618-19.

Third, the Court of Appeals suggested that, while the United States Constitution does not bind foreign governments in relationships with their nationals, when rights of non-resident aliens to property within the United States are adjudicated in United States courts, aliens may well be entitled to due process protection.[20] It saw no need to decide that issue, however, in view of the clear preference for class actions in antitrust cases expressed in the *Hawaii* case.

The reasoning of the Court of Appeals is entirely sound, its opinion is consistent with the applicable opinions of this Court, and no review of its decision is warranted. Neither of petitioners' major arguments to the contrary alters this conclusion.

Petitioners argue first that the Court of Appeals, by applying the same analyses to the *parens patriae* claims of foreign sovereigns as it applied to the states of the United States, failed to make the necessary concession to foreign and international elements involved in these cases. Petitioners maintain that if the rules applicable to suits by the United States government in a representative capacity were applied here, they would have the right to assert such claims.[21]

[20]Sardino v. Federal Reserve Bank, 361 F.2d 106, 111 (2d Cir. 1966).

There is, of course, no judicial authority in the United States (and, indeed, there will never be judicial authority in the United States so long as we have our Constitution) to support the notion that the United States government could arbitrarily appropriate for itself the antitrust claims given by Congress to injured "persons".

The two cases cited by petitioners in support of their position that the United States would have the right to sue in a representative capacity in comparable circumstances do not support their arguments. There was no suggestion in either case that the United States would appropriate for its own benefit the claims of the injured parties or that defendants would be exposed to potential multiple liability for the same injury. *United States v. San Jacinto Tin Co.*, 125 U.S. 273 (1888), was a suit to cancel a land patent and did not involve claims for damages. *United States v. Brand Jewelers, Inc.*, 318 F. Supp. 1293 (S.D.N.Y. 1970), was a suit for injunction and accounting seeking restitution only on behalf of those injured parties who appeared and established a right to relief.

Petitioners also argue that the decision of the Court of Appeals is inconsistent with the rule of international law that, when a foreign sovereign espouses a private claim and presents it for payment, our own government does not normally inquire as to how the foreign sovereign will dispose of those proceeds. [22] That is a rule, however, which is applied in negotiated, voluntary transactions involving payments

[21]India Petition, p. 18.
[22]India Petition, p. 23.

out of the government treasury and not to litigation involving private property.

Petitioners, recognizing that our courts have uniformly refused to give effect to foreign confiscatory decrees purporting to divest foreign nationals of property within the United States,[23] also argue that the Court of Appeals was wrong in construing the assertion of claims in a representative capacity by a foreign sovereign as a "taking".[24]

It does not matter what terminology is applied to the process by which individual claims pass involuntarily from the persons injured to the sovereign. The cause of action under Section 4 of the Clayton Act is provided to those who were injured in their business or property. Petitioners admit that if they have acquired the claims of their citizens, they have done so without the consent of the citizens and without compensation, and they admit further that they do not intend to distribute the proceeds to the injured persons.[25] Thus, their actions are not brought to compensate persons who were injured in their business or property and consequently are not suits authorized by Congress under Section 4 of the Clayton Act.

III.

THERE IS NO CONFLICT OF DECISIONS

Petitioners have also urged that the writs of certiorari should be granted to resolve conflicts between decisions of different Courts of Appeals and conflicts between the deci-

[23]Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 447 (1964). *See also* Maltina Corp. v. Cawy Bottling Co., 462 F.2d 1021 (5th Cir. 1972).

[24]India Petition, p. 27.

[25]India intends to allocate any recovery "based on present needs," not on "past purchases." India Petition, p. 9. Iran has decreed that any recovery will be distributed to charity, not to injured parties. Iran Petition, p. 10.

sion of the Eighth Circuit and decisions of this Court. The fact is, however, that the Court of Appeals securely based its decision on recent opinions of this Court and on decisions of other courts that are not in conflict with other authorities.

Petitioners correctly point out that the Court of Appeals found an overwhelming public policy preference for class actions as opposed to *parens patriae* claims.[26] Their assertion that dictum in *West Virginia v. Chas. Pfizer & Co.*, 440 F.2d 1079 (2d Cir. 1971), *cert. denied*, 404 U.S. 871 (1971), is inconsistent with that policy ignores the fact that *West Virginia* was decided before this Court's clear statement in *Hawaii v. Standard Oil Co., supra,* concerning the use of *parens patriae* claims to circumvent the requirements of Rule 23 and involved a settlement mechanism complying fully with Rule 23 that was the product of agreement among the parties.

Petitioners also argue that the decision of the Court of Appeals is in conflict with *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968). Petitioners' argument is based on a wrong reading of *Hanover Shoe*. That case does not stand for the principle that the courts must always adopt those principles of law which permit the easiest and biggest antitrust judgment for treble-damage plaintiffs. In fact, this Court, by denying states the right to sue as *parens patriae*, would, by petitioners' logic, be as guilty as the Eighth Circuit, of failure to follow *Hanover Shoe*.[27]

[26]*See* India Petition, p. 29.

[27]Hawaii v. Standard Oil Co., *supra*. It is interesting to note that both the Hart-Scott Bill and the Rodino Bill, which were introduced in Congress after this Court's decision in that case would, if enacted, give a right to sue as *parens patriae* only on behalf of the several states. S. 1284, 94th Cong., 1st Sess. (1975); H.R. 12921, 93d Cong., 2nd Sess. (1974). The pendency of antitrust *parens patriae* bills in Congress also

Granting that *Hanover Shoe* does express a general policy favoring private antitrust enforcement, it cannot be assumed, as petitioners argue without benefit of support from the record, that unless foreign governments are allowed to sue as *parens patriae* or in a representative capacity, private antitrust enforcement with respect to foreign commerce will be ineffective.[28]

Citizens of foreign countries have historically had a right to recover treble damages for injuries suffered as a result of violations of our antitrust laws, and, contrary to petitioners' assertions, have, in fact, exercised that right,[29] and, as petitioners themselves have emphasized, foreign sovereigns have ample power to enact and enforce antitrust statutes within their own jurisdictions as many sovereigns so forcefully have done.[30]

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weighs against the grant of certiorari here. If there are reasons to permit antitrust suits by foreign governments as *parens patriae*, Congress can weigh those reasons with the help of testimony from the State, Treasury, Justice, and all other affected executive departments, in connection with its overall consideration of those pending bills.

[28]India Petition, p. 12.

[29]The Department of Justice did not, as petitioners claim, say in its amicus brief filed with the Eighth Circuit that it knew of only two instances in which foreign plaintiffs had brought suit under the antitrust laws. India Petition, p. 11. In addition to the two cases mentioned by the Department of Justice and cited by petitioners, there are numerous others. *See e.g.*, Todhunter-Mitchell & Co. v. Anheuser-Busch, Inc., 375 F. Supp. 610 (E.D. Pa. 1974) (Plaintiff was a Bahamian corporation); Joseph Muller Corp. Zurich v. Societe Anonyme de Gerance et D'Armement, 451 F.2d 727 (2d Cir. 1971), *cert denied*, 406 U.S. 906 (1972) (Swiss corporation v. French corporation); Gretener, A. G. v. Dyson-Kissner Corp., 298 F. Supp. 350 (S.D.N.Y. 1969) (Plaintiff was a Swiss corporation).

[30]*See e.g.*, United Brands Company, 2 CCH Comm. Mkt. Rep. § 9800 (Dec. 17, 1975).

CONCLUSION

For the foregoing reasons, respondents respectfully submit that the requirements of Supreme Court Rule 19(b) have not been met and that these petitions should be denied.

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Respectfully submitted,

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APPENDIX A

Section 4, Clayton Act (38 Stat. 731; 15 U.S.C. §15)

§15. Suits by persons injured; amount of recovery

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Rule 23, Federal Rules of Civil Procedure

Rule 23.

CLASS ACTIONS

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequate protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b) (3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b) (1) or (b) (2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b) (3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c) (2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs. As amended Feb. 28, 1966, eff. July 1, 1966.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

76-1064 September Term, 1975

PFIZER, INC., AMERICAN CYANAMID COMPANY, BRISTOL-MYERS COMPANY, SQUIBB CORPORATION, E. R. SQUIBB & SONS, INC., OLIN CORPORATION and the UPJOHN COMPANY,

Appellants,

vs.

THE GOVERNMENT OF INDIA, THE REPUBLIC OF VIETNAM, THE IMPERIAL GOVERNMENT OF IRAN, and THE REPUBLIC OF THE PHILIPPINES by and through the Central Bank of the Philippines,

Appellees.

Appeal from the United States
District Court for the
District of Minnesota

The court has considered an application for leave to take interlocutory appeal pursuant to 28 U.S.C. §1292(b) together with memorandums opposing the petition and, being fully advised in the premises, it is now here ordered that the petition to take interlocutory appeal be, and it is hereby, granted. The clerk of this court is directed to regularly docket this appeal.

January 22, 1976

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975
NO. 75-975

GOVERNMENT OF INDIA, Petitioner

v.

PFIZER, INC., ET AL., Respondents

NO. 75-976

IMPERIAL GOVERNMENT OF IRAN, Petitioner

v.

PFIZER, INC., ET AL., Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITIONERS JOINT BRIEF IN REPLY TO JOINT BRIEF FOR RESPONDENTS IN OPPOSITION

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975
NO. 75-975

GOVERNMENT OF INDIA, Petitioner

v.

PFIZER, INC., ET AL., Respondents

NO. 75-976

IMPERIAL GOVERNMENT OF IRAN, Petitioner

v.

PFIZER, INC., ET AL., Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITIONERS JOINT BRIEF IN REPLY TO JOINT
BRIEF FOR RESPONDENTS IN OPPOSITION

I. Introduction

This brief is filed pursuant to Rule 24(4) of the Rules of this Court in reply to the argument first raised by respondents in their joint Brief

in Opposition that the question of whether foreign sovereigns can sue under the antitrust laws as parens patriae or official representative should not be decided before the question of the standing of foreign sovereigns to sue in any capacity under U. S. antitrust laws is resolved. (Respondents Brief, p. 7.)

II. Argument

In putting their position forward, respondents have failed to set forth fully certain significant facts which completely undermine their argument.

Respondents ~~Petitioners~~ ground their argument on the theory that the "person" issue is not yet "resolved" and that the reason it is not before this Court for resolution at this time is petitioners' opposition to all efforts to have the "person" issue certified for interlocutory appeal.

(1) The "person" issue has been resolved at the District Court level. State of Kuwait, et al. v. Pfizer, Inc., et al., 333 F. Supp. 315 (S.D.N.Y. 1971).[1/] Respondents, however, argue that the issue in the Petition may be resolved only after the "person" issue is decided definitively by this Court (Respondents Brief, p. 10.) In effect, respondents, although recognizing the significance of the parens patriae and official

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1/ This decision has stood for four years as the law of the case (Transcript of pre-trial conference of August 7, 1974, pp. 36-39). Defendants have filed answers in most of the cases, and have been permitted to seek discovery on substantive issues. In the Viet Nam case, plaintiff has produced hundreds of documents, answered numerous interrogatories and brought five top ranking Vietnamese government officials to Washington for lengthy depositions. Also, the Philippines case has proceeded to a consideration of class certification with the National Bank of the Philippines as class representative. Defendants have been permitted discovery on class issues in that case.

representative issues, suggest a course of action which may well preclude this Court from ever reviewing these important issues. It is possible, for example, that this Court may never have the opportunity to review the "person" issue at all.

(2) Respondents further suggest that ". . . petitioners have resisted appellate review of both issues at one time." (Respondents' Brief, p. 10.)

However, the facts demonstrate that the "person" issue was not long ago resolved because of respondents' unremitting resistance to appellate review and not petitioners' lack of diligence. In fact, respondents had ample opportunity to get what they now call the "basic issue" resolved long before India filed suit in this case asserting parens patriae and official representative claims. In November

1972 plaintiff Philippines, the respondents, and the District Court all agreed to an interlocutory appeal from the District Court's decision on the "person" issue. (Transcript of Pre-Trial Conference, November 1, 1972, pp. 67, 80-2.) It was however respondents, for their own reasons, who chose not to file a motion for certification of interlocutory appeal. Had they done so, the "person" issue would have long ago been decided at least by the Court of Appeals.[2/]

In view of the above, respondents' suggestion that foreign sovereign plaintiffs

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2/ Respondents had an even earlier opportunity to pursue an appeal. After the Kuwait decission defendants obtained permission from both the District Court and the Second Circuit Court of Appeals to take an interlocutory appeal on the "person" issue. The case, however, was dismissed without prejudice prior to such appeal.

opposed "all efforts" to have the "person" issue resolved first must be seen as the "red herring" that it is.

(3) Respondents' argument that the parens patriae and official representative issues cannot be resolved before the "person" issue also flies in the face of the decision by the Eighth Circuit which does that very thing and which respondents claim is correct.

The Eighth Circuit was well able to reach a conclusion on the parens patriae issue without reaching a decision on the "person" issue. By now arguing that this Court should deny review of the parens patriae issue because the "person" issue is "unresolved", respondents are in effect claiming that the Eighth Circuit erred thereby and are requesting this Court to review that decision. In so doing respondents do not meet the require-

ments of Rules 22 and 23 since they have not filed a petition for Certiorari within the jurisdiction time limitation set forth therein. Thus, the issue raised by respondents is not properly before this Court.

(4) The feeble effort by respondents to politicize this issue on page 12 of their brief is totally inappropriate. Those arguments of respondents addressed to the "person" issue can be of no force or effect since the "person" issue is not before this Court.

III. Conclusion

For the foregoing reasons and for the reasons set forth in their original Petition, respondents respectfully submit that their petition for a writ of certiorari be granted.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing PETITIONERS JOINT BRIEF IN REPLY TO JOINT BRIEF FOR RESPONDENTS IN OPPOSITION was served upon the following by depositing copies in the U. S. mail, first class postage prepaid, on February 20, 1976.

Dated: February 20, 1976

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